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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1930

No. 330

TWIN CITY PIPE LINE COMPANY AND INDUSTRIAL OIL & GAS COMPANY, PETITIONERS,

vs.

HARDING GLASS COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 2, 1930

CERTIORARI GRANTED OCTOBER 20, 1930

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[fol. 1] Citation, in usual form, showing service on Harry P. Daily and John P. Woods, filed July 11, 1929, omitted in printing.

[fol. 2] [Caption omitted]

IN UNITED STATES DISTRICT COURT, WESTERN ARKANSAS

No. 476. Equity.

TWIN CITY PIPE LINE COMPANY and INDUSTRIAL OIL & GAS COMPANY, Plaintiffs

vs.

HARDING GLASS COMPANY, Defendant

BILL OF COMPLAINT—Filed June 4, 1928

Now come the plaintiffs and for their cause of action against the defendant herein say:

That the plaintiff, Twin City Pipe Line Company, is a corporation, duly organized and existing under the laws of the State of Arkansas, with its principal place of business in the Fort Smith Division of the Western District of Arkansas in said state.

And that the plaintiff, Industrial Oil & Gas Company, is a corporation, duly organized and existing under the laws of the State of Arkansas, with its principal place of business in the Fort Smith Division of the Western District of Arkansas, in said state.

That the Harding Glass Company is a corporation, duly organized and existing under the laws of the State of West Virginia; that said Harding Glass Company has complied [fol. 3] with the laws of the State of Arkansas relative to foreign corporations doing business in the State of Arkansas, and that its principal and only place of business in the State of Arkansas is located in said City of Fort Smith, where it has and operates its two glass factories and maintains an office.

That this is a suit of a civil nature in equity, and that the matter in dispute in this suit exceeds exclusive of interest and costs the sum and value of $3000.00; and that this suit and every issue of law and fact therein is wholly between citizens of different states; that is to say, the plaintiffs, and each of them, are citizens of the State of Arkansas, and the defendant is a citizen of the State of West Virginia.

Plaintiffs further state that in a suit heretofore pending in this United States District Court for the Western District of Arkansas, Fort Smith Division, in which Harding Glass Company was plaintiff, and Twin City Pipe Line Company, Industrial Oil & Gas Company and S. H. Hale were defendants, being Cause No. 448 in Equity, it was, among other things, alleged in the bill of complaint of Harding Glass Company (1) that the Twin City Pipe Line Company and the Industrial Oil & Gas Company together produce gas and sell it in the City of Fort Smith; (2) that said companies were at that time furnishing gas to the Harding Glass Company; (3) that said companies had undertaken to furnish gas to the Harding Glass Company and were so doing, both under contract and as public utilities; (4) that said companies were failing to furnish a sufficient supply and a sufficient pressure of gas to the Harding Glass Company; (5) and it was prayed that the said Twin City Pipe Line Company and Industrial Oil & Gas Company be required to furnish gas to the Harding Glass Company of sufficient pressure.

In an amendment to the said bill of complaint it was, among other things, alleged that the Twin City Pipe Line Company owns a large line immediately to the north of the Harding Glass Company, and that a connection could easily be made between that pipe line and the plant of the Harding Glass Company, to the end that the Harding Glass Company would receive and have ample pressure for its gas; that the Twin City Pipe Line Company had failed to make such connection.

That said Cause No. 448 was by this Court consolidated with two suits then pending in this Court, in each of which Twin City Pipe Line Company was plaintiff and Harding [fol. 4] Glass Company was defendant; that this Court had jurisdiction over both of the parties and of the subject matter of said consolidated cause.

That on the 13th day of July, 1926, in said consolidated cause it was among other things adjudged and decreed by this Court: (1) that the Industrial Oil & Gas Company was a producing gas company and that it sold its entire production of gas to the Twin City Pipe Line Company; (2) that the Twin City Pipe Line Company was a public utility, but that the Industrial Oil & Gas Company was not; (3) that neither the Twin City Pipe Line Company nor the Industrial Oil & Gas Company, or either of them, was under any duty by virtue of contract or by virtue of the Twin City Pipe Line Company being a public utility to lay or construct any additional lines or to make any additional connections with the Harding Glass Company; (4) that the complaint of the Harding Glass Company, being without merit, should be and was dismissed for want of equity.

That the Harding Glass Company duly took an appeal from said decree with the United States Circuit Court of Appeals for the Eighth Circuit but that after taking said appeal the Harding Glass Company, in compliance with Section 2 of the contract hereinafter set out, duly dismissed its appeal, and that said decree now is and stands unreversed and unmodified and in full force and effect, and that the matters and things above set forth, which were determined, adjudged and decreed in said decree were and are res adjudicata between the plaintiffs and the defendant in this cause.

That on the 30th day of August, 1926, a written contract was duly entered into by and between the Twin City Pipe Line Company and the Industrial Oil & Gas Company, as parties of the first part, and Harding Glass Company, as party of the second part, by the terms of which it was mutually agreed, in consideration of the undertakings and agreements to be done and performed by the Twin City Pipe Line Company and the Industrial Oil & Gas Company on the one hand and the Harding Glass Company on the other, that:

(1) All judgments and decrees now entered for or against either of them, or S. H. Hale, are to be satisfied and cancelled, and all former contracts between S. H. Hale and the Harding Glass Company, and between the Industrial Oil & Gas Company and the Harding Glass Company, and between the Twin City Pipe Line Company and the Hard-

ing Glass Company, are hereby abrogated as of September 1, 1926.

[fol. 5] (2) All suits and appeals now pending between either of the parties hereto, or S. H. Hale, are to be dismissed and each party thereto is to pay its own costs, all questions involved in said suits having been adjusted and settled.

(3) The Twin City Pipe Line Company agrees to lay at once an 8" pipe line from a connection with its 10" line at or near what is known as "The Carbarn" to a connection with its 8" line on Sixth Street near its regular station, said 8" line to run by the meter station where the gas furnished the Harding Glass Company is measured, and to be connected at said meter station with the lines furnishing the Harding Glass Compa-y with gas.

(4) The Harding Glass Company agrees to take all its requirements of gas for its plants in the city of Fort Smith, Arkansas, from the Twin City Pipe Line Company so long as the Twin City Pipe Line Company can adequately supply its requirements and to pay for all gas furnished it hereunder, beginning September 1, 1926, at the regular sliding schedule of rates of twelve cents to fifteen cents, which is the rate now in effect for industries in the city of Fort Smith, Arkansas, or at such rate as may hereafter be fixed for industries in the city of Fort Smith by the proper regulatory body or court having jurisdiction. All gas consumed by the Harding Glass Company up to September 1, 1926, shall be paid for at the rate of ten cents per thousand cubic feet.

(5) The Harding Glass Company agrees that in the event there is a shortage of gas so that there is not enough to adequately supply the domestic consumer, that the Twin City Pipe Line Company may discontinue serving it gas, upon condition that the same character of service be given the Harding Glass Company that is given other industries in the city of Fort Smith, Arkansas, and that his gas service be not discontinued unless that of other like industries is discontinued also.

That the Twin City Pipe Line Company and the Industrial Oil & Gas Company, and each of them, have fully and

completely carried out and performed each and every one of the undertakings, agreements, covenants and conditions in said contract contained on their part to be performed.

That since the date that said contract was entered into and up until the date of the filing of this suit the Harding Glass Company has taken all of its requirements of gas for its plants in the city of Fort Smith, Arkansas, from the [fol. 6] Twin City Pipe Line Company and has paid for same at the regular schedule of rates which are in effect, but that said Harding Glass Company is now threatening, without cause and without justification, to cease taking its requirements of gas from the Twin City Pipe Line Company; and has taken active steps and is now making active preparations to take its requirements of gas from another corporation in which said Harding Class Company owns stock. That said Harding Glass Company has been instrumental in securing the passage of an ordinance permitting said other gas company to lay a pipe line from its gas wells to the plants of the Harding Glass Company in the city of Fort Smith, and that the Harding Glass Company has now notified the Twin City Pipe Line Company and the Industrial Oil & Gas Company that as soon as said pipe line, so authorized by said ordinance, has been completed, that it will cease to take its requirements of gas from the Twin City Pipe Line Company. And said Harding Glass Company has notified the Twin City Pipe Line Company and the Industrial Oil & Gas Company that upon the completion of said pipe line it will no longer carry out or perform the terms of said contract and that it will no longer take its requirements of gas from the Twin City Pipe Line Company; and that it is its intention and purpose to breach said contract and to take its requirements of gas from said other company the minute said pipe line is completed.

That at the time said contract was entered into it was well known by the Harding Glass Company that the Industrial Oil & Gas Company was engaged in the production of natural gas and that this was the sole and only business that it was engaged in; and that the Twin City Pipe Line Company was engaged in the distribution of gas from the natural gas field in Crawford County to the city of Fort Smith and vicinity where said Twin City Pipe Line Company sold said natural gas to industries and to the Fort

Smith Light & Traction Company, a distribution company, which furnished gas to domestic consumers. That it was further well known to the Harding Glass Company at the time said contract was entered into that the Industrial Oil & Gas Company sold all of the gas which it produced to the Twin City Pipe Line Company, and that the Industrial Oil & Gas Company had no other market whatsoever for its gas, and that it is well known to the Harding Glass Company that this condition obtains at the present time.

That ever since that contract was entered into the Twin City Pipe Line Company has adequately supplied the re- [fol. 7] quirements of the Harding Glass Company, and that the Harding Glass Company is fully advised and knows that at the present time the Twin City Pipe Line Company can adequately supply the requirements of the Harding Glass Company.

That said contract contemplated the furnishing of natural gas and of natural gas only. And that in order to maintain an adequate supply of natural gas it is necessary to continue to drill new gas wells at a large expense, to develop new fields, to acquire new gas acreage and to pay rentals on unproven acerage and to constantly keep the development well in advance of present needs. That in order to adequately supply the Harding Glass Company its requirements of natural gas and to be in a position to continue to adequately supply it with gas, the Twin City Pipe Line Company has caused the Industrial Oil & Gas Company, and the Industrial Oil & Gas Company has, since the date of said contract, expended in excess of $64,000 in drilling new wells, a large number of which wells have been drilled in what was theretofore unproven or wild-cat territory. That the Industrial Oil & Gas Company has developed one entirely new field in which it now has a number of producing wells. That said gas is available to the Twin City Pipe Line Company, and that no gas has ever been drawn from said new field, and that the actual and potential supply of the Twin City Pipe Line Company at the time of the filing of this suit is far in excess of what it was at the time that said contract was entered into, and that this result has been obtained as a result of an honest and diligent effort on the part of the Twin City Pipe Line Company and the Industrial Oil & Gas Company to main-

tain and to have maintained for the Harding Glass Company, far in advance of its needs therefor, an adequate supply of gas for the requirements of said Harding Glass Company.

That the Twin City Pipe Line Company can certainly continue adequately to supply all of the requirements of the Harding Glass Company for a very long period of time yet to come. That it now has developed and available through the Industrial Oil & Gas Company, without the drilling of any more wells, an adequate supply of gas to meet all requirements of the Harding Glass Company and its other customers for at least an additional year and, by the drilling of additional wells and the development of additional acreage now available to it through the Industrial Oil & Gas Company, can continue to supply Harding Glass [fol. 8] Company for a long period of time thereafter; that no one can predict with certainty just how long it can continue to adequately supply said Harding Glass Company, but plaintiffs allege that, in anticipation of the needs and requirements of said Harding Glass Company under said contract, that they have developed in advance and have now available sufficient gas to supply all of the requirements of the Harding Glass Company and the other customers of the Twin City Pipe Line Company for a long period of time. That natural gas cannot be purchased in the open market at will, and that it was absolutely necessary for the Twin City Pipe Line Company to cause the outlays to be made above set forth, in order to be in a position to adequately supply the requirements of the Harding Glass Company.

Plaintiffs further allege that the Twin City Pipe Line Company expended in excess of $3,800.00 in laying the 8" pipe line in accordance with the covenant and agreement contained in said contract between the plaintiffs and the defendants; that said pipe line was laid for the sole use and benefit of the Harding Glass Company; that said pipe line will have no value except a junk value of not to exceed $500.00 in the event that the Harding Glass Company ceases to take its requirements from the Twin City Pipe Line Company. That all of the above facts are well known to the Harding Glass Company. That the requirements of the Harding Glass Company vary. That its gas require-

ments in 1925 were 776,000,000 cubic feet of gas; that its requirements of 1926 were 764,000,000 cubic feet; and that its requirement in 1927 were 582,000,000 cubic feet. That by reason of the facts hereinbefore set forth the plaintiffs have no plain adequate remedy at law, and that this suit is brought in its present form to prevent a multiplicity of suits.

Wherefore, premises considered, plaintiffs pray:

1. That Harding Glass Company, pending the hearing of this suit, be enojoined from taking its requirements of gas from any other firm, person or corporation other than the Twin City Pipe Line Company.

2. That, upon final hearing, said Harding Glass Company be required to specifically perform its contract.

3. That the plaintiffs have all other and further relief to which they may be entitled.

Pryor, Miles & Pryor, Daily & Woods, Solicitors for Plaintiffs.

[fol. 9] IN UNITED STATES DISTRICT COURT

MOTION OF HARDING GLASS COMPANY TO DISMISS—Filed June 12, 1928

Comes the Harding Glass Company, and moves the court to dismiss this cause upon the following grounds:

1

There is a nonjoinder of parties. The contract on which the suit is based shows that S. H. Hale is a party to the contract. The said S. H. Hale is not made a party to this suit.

2

There is an insufficiency of fact in the complaint to constitute a valid cause of action in equity.

3

The complaint does not state facts sufficient to constitute a valid cause of action against this defendant.

Premises considered, the defendant prays that this cause be dismissed.

James B. McDonough, Counsel for Defendant.

IN UNITED STATES DISTRICT COURT

ORDER OVERRULING MOTION TO DISMISS—January 29, 1929

The motion of defendant to dismiss this cause having been argued by counsel and submitted, it is now by the court considered, ordered, adjudged and decreed that said motion be and the same is hereby, overruled. To which ruling the defendant excepts.

This January 29, 1929.

Frank A. Youmans, Judge.

IN UNITED STATES DISTRICT COURT

MOTION TO TRANSFER TO LAW—Filed February 20, 1929

Comes the defendant, the Harding Glass Company, and moves the court to transfer this cause to the law side of the docket upon the following grounds:

Upon the facts set forth in the complaint herein, the plaintiffs, if they have any remedy, have a perfect and [fol. 10] complete remedy at law. A court of law has jurisdiction, and the defendant is entitled to a jury under the statutes and Constitution of the United States.

Premises considered, the defendant prays that this cause be transferred to a court of law, and for all other relief.

James B. McDonough, Attorney for Defendant.

IN UNITED STATES DISTRICT COURT

MOTION TO DISMISS BECAUSE OF DEFECT IN PARTIES—Filed February 25, 1929

Comes the defendant, the Harding Glass Company, and moves the court to dismiss this cause for the reason that

S. H. Hale, being a party to the contract sued on, is an indispensable party.

Premises considered, the defendant prays that said cause be dismissed unless the plaintiff will, within a reasonable time, make said Hale a party to this cause.

James B. McDonough, Attorney for Harding Glass Co.

IN UNITED STATES DISTRICT COURT

ORDER OVERRULING MOTION TO DISMISS AND MOTION TO TRANSFER TO LAW—February 28, 1929

Defendant's motion to strike certain allegations of the complaint in this cause having been argued by counsel and submitted, the court being well and sufficiently advised in the premises doth overrule said motion. To which ruling defendant excepts.

Defendant's motion to dismiss this cause on the ground of a defect in parties having been argued by counsel and submitted, the court being well and sufficiently advised in the premises doth overrule said motion. To which ruling defendant excepts.

Defendant's motion to transfer this cause to law having been argued by counsel and submitted, the court being well and sufficiently advised in the premises doth overrule said motion. To which ruling the defendant excepts.

This February 28, 1929.

Frank A. Youmans, Judge.

[fol. 11] IN UNITED STATES DISTRICT COURT

ANSWER—Filed March 5, 1929

Comes the defendant, the Harding Glass Company, and for its answer herein, states as follows:

This defendant does not waive its right to have this cause dismissed as set forth in the original motion to dismiss and the subsequent motion to dismiss, and reserves its rights, if any, under its motion to transfer this cause to law, and reserves also its rights set up in its motion to

strike certain parts of the complaint herein. Reserving these rights, the defendant, for its answer, states as follows:

This defendant denies that it contended and alleged in suit 448 described in the complaint, that the Industrial Oil & Gas Company owned the pipe lines in the city of Fort Smith, and alleges the truth to be that said Industrial Oil and Gas Company was a producing company, and this defendant did not know the relations between the Industrial Oil and Gas Company and the Twin City Pipe Line Company at the time that the contracts were made. This defendant did not know at the time that said complaint was filed that the Industrial Oil and Gas Company was not a public service corporation, and denies that this defendant contended in that suit the Industrial Oil and Gas Company was under any contract to furnish gas to the Harding Glass Company. This defendant did not know at that time the relation between S. H. Hale and the Industrial Oil & Gas Company. This defendant at that time had a contract for gas with S. H. Hale, and the purpose of that suit mainly was to compel the Twin City Pipe Line Company to discharge its public duty as a public utility and to compel S. H. Hale to furnish gas which he had obligated himself to furnish under the contract.

This defendant denies that any prayers or contentions in said suit number 448 affected in any way the rights of this defendant or of the plaintiff in this present suit. This defendant admits that several causes of action were consolidated in said cause number 448, and that said causes were tried together and a decree rendered by this court, from which appeals were taken.

This defendant denies that the Industrial Oil and Gas Company, in the contract of August 30, 1926, obligated itself to furnish any gas to the defendant, and denies that in that contract the Twin City Pipe Line Company ob- [fol. 12] ligated itself to furnish any gas to this defendant for any specific time.

This defendant alleges that the contract which was entered into on August 30, 1926, which contract abrogated and set aside all the decrees, orders and judgments rendered in cause 448, is in words and figures as follows:

Twin City Pipe Line Company, Fort Smith, Arkansas.

In consideration of the undertakings and agreements hereinafter set out to be done and performed by the Twin City Pipe Line Company and Industrial Oil and Gas Company and the Harding Glass Company, it is mutually agreed as follows:

(1) All judgments and decrees now entered for or against either of them or S. H. Hale, are to be satisfied and cancelled, and all former contracts between S. H. Hale and the Harding Glass Company, and between the Industrial Oil and Gas Company and the Harding Glass Company, and between the Twin City Pipe Line Company and the Harding Glass Company, are hereby abrogated as of September 1, 1926.

(2) All suits and appeals now pending between either of the parties hereto, or S. H. Hale, are to be dismissed and each party thereto is to pay its own costs, all questions involved in said suits having been adjusted and settled.

(3) The Twin City Pipe Line Company agrees to lay at once an 8" pipe line from a connection with its 10" line at or near what is known as "The Carbarn" to a connection with its 8" line on Sixth Street near its regulator station, said 8" line to run by the meter station where the gas is furnished the Harding Glass Company is measured, and to be connected at said meter station with the lines furnishing the Harding Glass Company with gas.

(4) The Harding Glass Company agrees to take all its rate now in effect for industries in the city of Fort Smith, Arkansas, from the Twin City Pipe line Company so long as the Twin City Pipe Line Company can adequately supply its requirements and to pay for all gas furnished it hereunder, beginning September 1, 1926, at the regular sliding schedule of rates of twelve cents to fifteen cents, which is the rate now in effect for industries in the city of Fort Smith, Arkansas, or at such rate as may hereafter be fixed for industries in the city of Fort Smith by the proper regulatory body of court having jurisdiction. All gas con- [fol. 13] sumed by the Harding Glass Company up to September 1, 1926, shall be paid for at the rate of ten cents per thousand cubic feet.

(5) The Harding Glass Company agrees that in the event there is a shortage of gas so that there is not enough to adequately supply the domestic consumer, that the Twin City Pipe Line Company may discontinue serving its gas, upon condition that the same character of service be given the Harding Glass Company that is given other industries in the city of Fort Smith, Arkansas, and that his gas service be not discontinued unless that of other like industries is discontinued also.

Witness our hands this 30th day of August, 1926.

Harding Glass Company, by C. H. Harding, President. Industrial Oil & Gas Co., by W. R. Martin, President. Twin City Pipe Line Co., by W. R. Martin, President.

I consent to above. S. H. Hale.

This defendant alleges that the Twin City Pipe Line Company owned the pipe lines and owned the gas, and said Twin City Pipe Line Company is a public service corporation, and was at the time that said contract was entered into, and the Industrial Oil and Gas Company, in making said contract, acted as a public service corporation, and was such.

This defendant denies that the Twin City Pipe Line Company and the Industrial Oil and Gas Company, or either of them, have fully and completely carried out and performed every one of the undertakings, agreements, covenants, and conditions of said contract, and denies that either of said companies obligated itself in any way to furnish any quantity of gas, and denies that there is any mutuality in said contract, and denies that there is any consideration in support of an alleged obligation against this defendant to take all its requirements of gas from the Twin City Pipe Line Company for any length of time, and denies that there was ever any obligation against this defendant to take all its requirements of gas from the Twin City Pipe Line Company for any length of time and denies that there was ever any obligation upon the Harding Glass Company to take any gas from the Industrial Oil and Gas Company for any specific time.

[fol. 14] This defendant denies that it has taken all its requirements from the Twin City Pipe Line Company and has

paid for the same at the regular schedule of rates. This defendant admits that from the time of the making of said contract, this defendant, until recently, did take all its requirements from the Twin City Pipe Line Company.

This defendant denies that it is threatening, without cause and without justification, to cease taking its requirements of gas from the Twin City Pipe Line Company. This defendant admits that it is now taking a part of its gas from the Citizens Pipe Line Company, which latter company is furnishing gas to this defendant for a part of its requirements.

This defendant denies that the Harding Glass Company has been instrumental in securing the passage of an ordinance permitting the Citizens Pipe Line Company to lay a pipe line from its gas field, in the State of Oklahoma, to the plants of the Harding Glass Company; but this defendant does admit that its president and its officers, as well as the officers of the Citizens Pipe Line Company, who are not all interested in the Harding Glass Company, did request the passage of an ordinance by the City Council of the City of Fort Smith granting to the Citizens Pipe Line Company the right to lay the pipe line through the streets of Fort Smith along certain streets to the plant of the Harding Glass Company, and alleges that the Twin City Pipe Line Company, the plaintiff herein, after this suit was brought, brought a suit in the State Chancery Court to enjoin the city of Fort Smith and the Citizens Pipe Line Company from constructing laying and extending said pipe line to the Harding Glass Company plant. The said suit was brought and a judgment rendered in the lower court, enjoining the Citizens Pipe Line Company from extending its pipe line to the Harding Glass Company's plant. An appeal was taken to the Supreme Court of the State of Arkansas, and that court reversed the decree of the lower court and entered an order dismissing the bill of complaint, thereby giving to the Citizens Pipe Line Company the right to lay pipes in the streets of Fort Smith, and to transport its gas to the plant of the Harding Glass Company, which, said Citizens Pipe Line Company is now doing.

This defendant denies that it has notified the Twin City Pipe Line Company, or the Industrial Oil and Gas Company, or either of them, that it would no longer comply with its said contract, but did notify the Twin City Pipe Line

[fol. 15] Company that upon the completion of the pipe line of the Citizens Pipe Line Company, the Harding Glass Company would not need to take all its requirements from the Twin City Pipe Line Company. After the completion of the line of the Citizens Pipe Line Company and the commencement of the furnishing of gas to this defendant by the Citizens Pipe Line Company, the Twin City Pipe Line Company changed its meters and its orifices and its pipes at the point of the delivery of it gas to the Harding Glass Company, so that it could not deliver to the Harding Glass Company the latter's requirements of gas. Thereupon the Harding Glass Company notified the Twin City Pipe Line Company that the orifices were too small, and that the Harding Glass Company would need more gas than could be furnished through the pipes and orifices and meters as thus reduced. Thereupon the Twin City Pipe Line Company again changed its meters and orifices and pipes so as to give the Harding Glass Company a greater quantity of gas and such amount of gas as it desires and needed in connection with the gas furnished by the Citizens Pipe Line Company, and the Harding Glass Company is now taking its gas both from the Citizens Pipe Line Company and the Twin City Pipe Line Company. The gas furnished by the Citizens Pipe Line Company is gas that is produced in the State of Oklahoma and is moved in interstate commerce, and the Harding Glass Company is the only customer which the Citizens Pipe Line Company has, and takes all of the gas of the Citizens Pipe Line Company. The said gas is transported from the state of Oklahoma and delivered to the Harding Glass Company at the latter's plant in the city of Fort Smith, State of Arkansas. The pipes and openings now used by the Twin City Pipe Line Company are insufficient in size to furnish to this defendant all its requirements of gas.

Further answering, this defendant states that the Twin City Pipe Line Company, as this defendant believes and alleges upon information and belief, has not sufficient gas to furnish this defendant its necessary fuel for a long term of years. This defendant has expended enormous sums of money in constructing glass plants of great value, reaching almost to one million dollars. This defendant has also expended enormous sums of money in building up a business of great value and extending over a large number of states,

including many states of the United States. This business is very valuable. It has been built upon the faith that there was a gas field in and around Fort Smith which would furnish gas for a long period of years. This defendant cannot [fol. 16] produce its products without the use of gas. The experience of this defendant, with the supply of gas of the Twin City Pipe Line Company, demonstrated and convinced this defendant that the Twin City Pipe Line Company would not at all times furnish a sufficient supply of gas. In order to protect the investment of this defendant, and in order to bring a sufficient supply of gas that would last a long number of years, it was necessary that this defendant invest money in the production of gas. This defendant did not make that investment for the purpose of making money as a gas producer, but solely for the protection of the business and interest of this defendant in the making of glass. This defendant gave notice of that condition and situation to the plaintiff, and the plaintiff was well aware that the only means that his defendant had to protect itself against great loss was to look forward to a longer supply of gas than could be furnished by the Twin City Pipe Line Company.

This defendant denies that it has any contractual relation whatever with the Industrial Oil and Gas Company, whereby the Industrial Oil and Gas Company is obligated to furnish any gas whatever to this defendant, and denies that the Industrial Oil and Gas Company is a proper party to this suit, and denies that it has any interest whatever in this litigation.

Further answering, this defendant denies that it was well known to this defendant at the time that said contract was made, that the Industrial Oil and Gas Company sold all of its gas to the Twin City Pipe Line Company, and denies that the industrial Oil and Gas Company has no other market for its gas than to sell the same to the Harding Glass Company, and alleges that the Industrial Oil and Gas Company, unless precluded by its contract with the Twin City Pipe Line Company, may sell its gas to other consumers in other states, as well as in the State of Arkansas.

This defendant denies that the Twin City Pipe Line Company has adequately supplied the requirements of the Harding Glass Company, and denies that the Harding Glass Company is fully advised and knows that the Twin City Pipe Line Company can adequately supply the requirements

of the Harding Glass Company, and denies that the Twin City Pipe Line Company or the Industrial Oil and Gas Company is expending money for the development of other gas fields, and denies that they can furnish this defendant with its full requirements of gas. This defendant denies that the Industrial Oil and Gas Company and the Twin City Pipe Line Company are continuing to drill new gas wells, and [fol. 17] alleges that they are not drilling any new wells and are not developing any new fields, and the principal thing which said companies have done is to purchase the control of other gas producing companies in Arkansas, and obtain a complete and full monopoly of all gas produced in and around Fort Smith, except that gas which belongs to the Le Flore County Gas and Electric Company, a corporation of Oklahoma, located at Poteau and the gas belonging to the Citizens Pipe Line Company which is delivered to the Harding Glass Company.

This defendant denies that the Twin City Pipe Line Company has caused the Industrial Oil and Gas Company to expend in excess of $64,000.00 in drilling new wells, and denies that the Industrial Oil and Gas Company has expended any such sums in drilling new wells, and denies that any such expenditures were made for the purpose of supplying the requirements of the Harding Glass Company, and denies that the Twin City Pipe Line Company, or the Industrial Oil and Gas Company, or either of them, have expended large sums in developing new fields hitherto unproven, in what is known as wildcat territory.

This defendant denies that the Industrial Oil and Gas Company has developed one entirely new field in which it now has a number of producing wells, and denies that said company or the Twin City Pipe Line Company, or either of them, have operated drilling operations so that they may continue to furnish the requirements of this defendant, and alleges the truth to be that if this defendant had not taken steps, in connection with others, to secure its own gas supply, it would be only a short time when the production of gas would be so small that the price would be prohibitive, and this defendant would be compelled to leave the State of Arkansas, and go to some field where gas could be purchased at a reasonable figure. The plaintiffs have not operated and are not operating their gas fields nor their leases

so as to keep up a supply for any reasonable length of time.

This defendant denies that the Twin City Pipe Line Company, or the Industrial Oil and Gas Company have new fields from which they have not drawn gas, and alleges the truth to be that unless new developments are made in addition to those that have been made by the Twin City Pipe Line Company and the Industrial Oil and Gas Company, [fol. 18] the supply of gas to this defendant will soon be short and it will suffer irreparable injury and loss by reason of the failure to keep up its gas supply.

Further answering, this defendant denies that the actual and potential supply of the Twin City Pipe Line Company is far in excess of what it was at the time that said contract was entered into, and alleges that it is much less.

This defendant denies that efforts of the Twin City Pipe Line Company and the Industrial Oil and Gas Company have produced a sufficient supply, and denies that such efforts as now made, or that will be made in the future, will produce a sufficient supply, and alleges that without the efforts of this defendant, the supply of gas furnished by the Twin City Pipe Line Company to this defendant will be exhausted, and this defendant will, therefore, suffer irreparable loss.

This defendant denies that the Twin City Pipe Line Company can continue to supply all of the requirements of the Harding Glass Company for a long period of time, and denies that the Twin City Pipe Line Company can, through the Industrial Oil and Gas Company, without the drilling of more wells furnish an adequate supply of gas to this defendant for the period of a year, and alleges that the furnishing of such gas for the period of a year only would result in irreparable loss to this defendant.

This defendant alleges that the Twin City Pipe Line Company is a public utility, and the Industrial Oil and Gas Company is also a public utility, and is compelled to furnish gas to all consumers in the same way and without discrimination, and neither the said Twin City Pipe Line Company nor the Industrial Oil and Gas Company has power or right to make a binding contract so as to compel any consumer to continue any length of time to take all of its requirements from the Twin City Pipe Line Company.

Further answering, this defendant denies that the Twin City Pipe Line Company, in anticipation of the needs and

requirements of this defendant, has developed any new field or brought in any new well, and denies that the Twin City Pipe Line Company can furnish the requirements of the Harding Glass Company and its other customers.

This defendant denies that it was necessary for the Twin City Pipe Line Company to cause the outlays to be made for the development of wells for the supply of gas to the Harding Glass Company, and denies that any of its expenditures were made for that purpose.

[fol. 19] Further answering, this defendant denies that the Twin City Pipe Line Company spent in excess of $3,800.00 in laying the 8" pipe line, in accordance with the covenant and agreements contained in said contract set up in the complaint, and denies that said pipe line was laid for the sole use and benefit of the Harding Glass Company, and denies that said pipe line will have no value except a junk value of not to exceed $500.00 in the even that the Harding Glass Company ceases to take its requirements from the Twin City Pipe Line Company, and denies that said alleged facts are well known to this defendant.

Further answering, this defendant alleges, that it was entitled to gas at the price of ten cents per thousand cubic feet from S. H. Hale, which contract did not expire until October 30, 1928. The plaintiff was more than compensated in all sums that it expended in laying the pipes for the use of this defendant by the receipt of $30,668.77, which paid for the price of gas to January 31, 1928, same representing the difference between the twelve cent rate under the contract of August 30, 1926, over the ten cent rate actually consumed by the defendant from September 1, 1926, to December 31, 1928. The Twin City Pipe Line Company was, therefore, paid said sum of money over and above what it would have received had the defendant continued to take the so-called Hale rate, being the ten cent rate.

After S. H. Hale had entered into his contract with this defendant Hale and the plaintiff entered into a contract whereby Hale sold to the plaintiff the contract of this defendant, together with all other gas produced in the neighborhood of Fort Smith, except the gas which is known to exist in the Gans field. The plaintiff took over said Hale contract and continued to perform and furnish gas to the defendant at the Hale rate. The plaintiff continued to do

that until the plaintiff brought out what is known as the Cazort gas, that purchase giving the plaintiff a complete monopoly of all the gas produced in and around Fort Smith, except the gas known as the Orr gas. The Orr gas did not compete with plaintiff's gas. After the plaintiff had secured the Cazort gas, the plaintiff then notified this defendant, but not before, that it would not comply with S. H. Hale's contract. Therefore, by reason of said facts, this defendant has paid to the plaintiff a profit of $30,668.77, which more than compensates the plaintiff for the laying of its pipes at an expense, as it alleges, of $3,800.00. [fol. 20] Further answering, the defendant states that said alleged contract is without mutuality, first there being no obligation on the plaintiffs, or either of them, to furnish gas, and therefore, said contract is illegal and void, and secondly, said contract is illegal and void because there exists an obligation and a duty upon the plaintiff to furnish to the defendant all the gas which the plaintiff could furnish so as to meet all the requirements. The duty of the plaintiff to furnish the gas was complete without said agreement. The said agreement is, therefore, illegal and void because without consideration.

Further answering, this defendant states that it is entitled, under the 5th amendment to the Constitution of the United States, to have the issues of fact tried by a jury and further states that if the plaintiff has any action, it is solely a cause of action in law, and this defendant, therefore, moves to transfer this cause to the law side of the docket.

Premises considered, the defendant prays that upon a final trial herein that it have judgment against the plaintiff for all costs in this action laid out and expended, and that the complaint be finally dismised, and for all other and further relief.

James B. McDonough, Attorney for Defendant.

IN UNITED STATES DISTRICT COURT

DECREE—July 2, 1929

Now on this 2nd day of July, 1929, a regular day of the June 1929 term of this court, this cause came on for final

hearing on the merits, having been heretofore argued by counsel; and thereupon, upon consideration thereof,.

It is, by the court, ordered, adjudged and decreed that the defendant, Harding Glass Company, be and it is hereby ordered and required to take all of its requirements of natural gas for its plants in the City of Fort Smith, Arkansas, from the Twin City Pipe Line Company so long as Twin City Pipe Line Company can adequately supply such requirements, and to carry out and specifically perform the written contract entered into between the plaintiffs and the defendant, which bears date of August 30th, 1926:

It is further ordered, adjudged and decreed that the defendant, Harding Glass Company be and it is hereby enjoined from taking any of its requirements of natural gas [fol. 21] for its plants in the City of Fort Smith, from any other person, firm or corporation so long as Twin City Pipe Line Company can adequately supply such requirements; or from in any manner violating the provisions of the contract of date August 30th, 1926.

To which decree the defendant at the time excepted.

Frank A. Youmans, Judge.

IN UNITED STATES DISTRICT COURT

Approved Statement of the Evidence—Filed July 19, 1929

CAPTION

Comes the defendant in this court, the Harding Glass Company, which is appellant in the Court of Appeals of the Eighth Circuit, and presents a statement of the evidence herein, including all the evidence introduced in this cause in the District Court. The said Harding Glass Company has caused to be reduced to a narrative form a part of the evidence in this court. The Harding Glass Company believes and alleges that it is essential for a proper review in this cause in the Court of Appeals of the Eighth Circuit, that a part of said evidence as shown below be set out in the exact words of the witnesses.

The Harding Glass Company has filed its petition for appeal, its assignment of errors and has furnished a supersedeas bond which had been approved, and the said Hard-

ing Glass Company was allowed thirty days within which to file its statement of the evidence. The said Harding Glass Company, therefore, submits a statement of the evidence shown below within the time allowed by the court, and respectfully prays that the Judge of the District Court certify to said evidence as set out below. The said evidence, which contains all the evidence in the record, as *as* follows:

Mr. Daily: The plaintiff offers in evidence the pleadings, that is, certified copy of the pleadings, orders, decree, mandates from the Circuit Court of Appeals in the consolidated cases in which Harding Glass Company was plaintiff and Twin City Pipe Line Company was defendant, being 448 Equity, all of which pleadings and orders are listed in the index sheet thereto, and which I can now submit to counsel so he can see what it is without reading all of it. And also certified copy of two opinions of this court in that case certified to under separate covers.

[fol. 22] Mr. McDonough: The defendant objects to the introduction of any or either of these documents, First, on the ground that the complaint itself shows that those judgment- and decrees were set aside, annulled and cancelled, and all appeals withdrawn, and, Second, because said documents and pleadings and decrees and each of them are incompetent, irrelevant and immaterial in the issues in this case.

The Court: They will be admitted subject to the objection to be ruled on hereafter.

Mr. Daily: I want to call the Court's attention to this, that I am offering the decree in this case and the satisfaction of the decree endorsed thereon by counsel for plaintiffs and defendants in that case; and also the mandate of the dismissal of the appeals in the Court of Appeals for the further purpose of showing performance of the contract alleged in the complaint and admitted in the answer. I am just calling the Court's attention to that.

The Court: Very well; they will be admitted now subject to the defendant's objection, and that will be ruled on hereafter.

Mr. McDonough: The objection goes to each of the documents separately. The cases are numbered 1192, 448 and 1200 Equity.

Said exhibits, omitting the certificates, being in words and figures as follows:

PLAINTIFF'S EXHIBIT 1-A

Certified Copy of Pleadings and Proceedings

DISTRICT COURT OF THE UNITED STATES, WESTERN DISTRICT OF ARKANSAS, FORT SMITH DIVISION

No. 1192. Law

TWIN CITY PIPE LINE COMPANY, Plaintiff,

vs.

HARDING GLASS COMPANY, Defendant

No. 1200. Law

TWIN CITY PIPE LINE COMPANY, Plaintiff,

vs.

HARDING GLASS COMPANY, Defendant

No. 448. Equity

HARDING GLASS COMPANY, Plaintiff,

vs.

TWIN CITY PIPE LINE COMPANY et al., Defendants

[fol. 23] Transcript of Removal—Filed in U. S. District Court Aug. 18, 1925

IN THE SEBASTIAN CIRCUIT COURT, FORT SMITH DISTRICT

TWIN CITY PIPE LINE COMPANY, Plaintiff,

vs.

HARDING GLASS COMPANY, Defendant

COMPLAINT AT LAW—Filed July 30, 1925

Now comes the plaintiff and for its cause of action against the defendant herein says:

That it is a corporation duly organized and existing under the laws of the State of Arkansas, with its principal place of business in the City of Fort Smith; that it is engaged as a public utility in supplying natural gas to industries in the City of Fort Smith at rates fixed and established by order of the Board of Commissioners of the City

of Fort Smith *at rates fixed and established by order of the Board of Commissioners of the City of Fort Smith,* pursuant to the provisions of Act No. 124 of the Acts of the General Assembly for the year 1921, approved February 15th, 1921. That the rate so established by the order of the Board of Comissioners of the City of Fort Smith and now in effect, at which the plaintiff shall sell and furnish gas to industries in said City of Fort Smith, is as follows:

For the first one million cubic feet of gas per month, 15c per thousand cubic feet,

For the next one million cubic feet of gas per month, 14c per thousand cubic feet.

For the next one million cubic feet of gas per month, 13c per thousand cubic feet.

For all over three million cubic feet of gas per month, 12c per thousand cubic feet.

That the defendant is a corporation duly organized and existing under the laws of the State of Arkansas, with its principal place of business in the City of Fort Smith, where it maintains and operates a glass factory at which it manufactures window glass.

That during the months of February, March, April, May and June, 1925 the plaintiff furnished and delivered to the defendant in the City of Fort Smith the following amounts [fol. 24] of natural gas, which were used by said defendant at its said industries in the City of Fort Smith, to-wit:

February, 1925	71,807 M. Cubic Feet
March, 1925	83,625 M. Cubic Feet
April, 1925	52,488 M. Cubic Feet
May, 1925	38,488 M. Cubic Feet
June, 1925	37,012 M. Cubic Feet

That the amount due and owing by the defendant to the plaintiff for said gas so furnished and delivered to the defendant in the City of Fort Smith is the sum of $34,305.40; that the defendant has paid to the plaintiff for said gas so furnished and delivered the sum of $28,342.00 leaving a balance due from the defendant to the plaintiff for said gas so furnished and delivered, at the rate so fixed and established and now in effect, the sum of $5,963.40. That there

is attached hereto and made a part hereof as "Exhibit A" an itemized statement showing the amount of gas furnished and delivered by the plaintiff to the defendant in the City of Fort Smith, during each of said months, the amount due by defendant to the plaintiff under said rate for each month, together with an itemized statement of all payments made by the defendant to the plaintiff.

Wherefore, premises considered, plaintiff prays judgment against the defendant in the sum of Five Thousand, Nine Hundred Sixty-three and 40/100 Dollars ($5,963.40), together with interest thereon at the rate of six per cent per annum from this date until the date of judgment.

Daily & Woods, Attorneys for Plaintiff.

Duly sworn to by W. R. Martin. Jurat omitted in printing.

[fol. 25] EXHIBIT A TO COMPLAINT

Harding Glass Company to Twin City Line Company, Dr.,
Month of ——, 192-

Date			Consumption
Feb.	1925.	71807 M cu. ft. @ 12 to 15¢	8,676.84
Mch.	"	83625 " " " " " " "	10,090.00
April	"	52488 " " " " " " "	6,358.56
May	"	38488 " " " " " " "	4,678.56
June	"	37012 " " " " " " "	4,501.44
		Total	$34,305.40

Payments

Mar. 11, 1925	$7,180.70	
Apr. 13, 1925	8,362.50	
May 13, 1925	5,248.80	
June 12, 1925	3,848.80	
July 11, 1925	3,701.20	
Total	28,342.00	28,342.00
Bal. Due 7/1/25		$5,963.40

[File endorsement omitted.]

IN THE SEBASTIAN CIRCUIT COURT, FORT SMITH DISTRICT.

TWIN CITY PIPE LINE COMPANY, Plaintiff,

vs.

HARDING GLASS COMPANY, Defendant

PETITION AND BOND FOR REMOVAL TO THE UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF ARKANSAS—Filed Aug. 17, 1925

To the Honorable John E. Tatum, Judge of the Circuit Court within and for the County of Sebastian, State of Arkansas, City of Fort Smith, in said State, and to said Court:

Comes now the defendant, the Harding Glass Company, being the defendant in the above entitled cause wherein the [fol. 26] Twin City Pipe Line Company is plaintiff, and this petitioner, the Harding Glass Company is defendant, and said petitioner herewith files this, its petition and bond for the removal of this cause from the Circuit Court of the Fort Smith District of Sebastian County, in which this cause is now pending, to the District Court of the United States, within and for the Western District of Arkansas, Fort Smith Division, to be held at the City of Fort Smith in said Western District of Arkansas and Fort Smith Division; and for ground and cause of removal the Harding Glass Company respectfully alleges and states:

This cause was filed in this Court on July 30, 1925, and the time within which to plead, answer, demur or otherwise plead to the complaint herein has not expired under the Laws of the State of Arkansas, in such cases made and provided.

This suit is of a civil nature being brought by the plaintiff herein to recover of and from the defendant a certain sum of money, named in the complaint at $5,963.40, and this is a suit of which the United States District Court for the Western District of Arkansas, Fort Smith Division, could have original jurisdiction.

The matter and amount in dispute exceeds the sum of $3,000 exclusive of interest and costs. The controversy herein is wholly between citizens of different states.

The Twin City Pipe Line Company is a corporation duly organized and existing under the Laws of the State of Arkansas, and under the law for jurisdictional purposes is a citizen and resident of the State of Arkansas.

The Harding Glass Company, the defendant herein, is a corporation organized and existing under the laws of the State of West Virginia, and has complied with the law of Arkansas, entitling a foreign corporation to do business in the State of Arkansas. This defendant, therefore, seeks to remove this cause from this said Court to the said United States Court upon the ground of the diversity of the citizenship of the plaintiff and this defendant. This defendant alleges that at the time of the commencement of this suit, and during all the time thereafter the plaintiff was in law a citizen and resident of the State of Arkansas, and still is such, and the defendant, the Harding Glass Comapny, during all of said time was and is a citizen and resiednt of the State of West Virginia, and has been such, and is such at the present time.

[fol. 27] This defendant, being at the time of the commencement of this suit, a citizen and resident of the State of West Virginia and being such at this time.

The petitioner further states that it has given the plaintiff and its counsel notice in writing of its intention to file this petition for removal and of its intention to file a bond as provided by the laws of the United States, conditioned as provided by said laws. The petitioner, the defendant herein, herewith presents a good and sufficient bond conditioned as required by the laws of the United States, entitling said defendant to remove said case as herein prayed.

The condition of said bond is as required by law and requires this defendant within thirty days from the filing of this petition for removal to file a certified copy of the record of this case in said District Court of the United States for the Western District of Arkansas, Fort Smith Division, and for the payment of all costs which may be awarded by said Court if the District Court shall determine that this suit was improperly or wrongfully removed thereto.

Therefore, the petitioner, the Harding Glass Company, prays the Circuit Court for the Fort Smith District of Sebastian County that it proceed no further herein except to order the removal, and to approve the bond herewith pre-

sented and direct the transcript of the record to be made and certified and transmitted as provided by law.

James B. McDonough, Attorney for Harding Glass Company, the Petitioner.

Duly sworn to by W. E. Harding. Jurat omitted in printing.

[fol. 28] BOND FOR REMOVAL

Know All Men By These Presents, that we, the Harding Glass Company as principal, and C. H. Harding and W. E. Harding, as sureties, are held and firmly bound unto the Twin City Pipe Line Company, a corporation, the plaintiff in this cause, and its successors and assignees, in the sum of $500,00 for the payment of which well and truly to be made, we and each of us bind ourselves, our heirs, executors and administrators jointly and severally by these presents.

The condition of this obligation is such that, whereas, the Harding Glass Company has applied by petition to the Circuit Court of the Fort Smith District of Sebastian County, in the State of Arkansas, to remove this cause above described pending in said Court wherein the Twin City Pipe Line Company, a corporation is plaintiff, and the Harding Glass Company is defendant, to the District Court of the United States for the Western District of Arkansas, Fort Smith Division, to be holden in the City of Fort Smith, State of Arkansas, and within said District.

And whereas, the said Harding Glass Company has prayed that said cause above described be removed to said United States Court, and that all further proceedings in the Circuit Court of Sebastian County for the Fort Smith District be stayed:

Now, therefore, if the Harding Glass Company shall file and enter in the District Court of the United States for the [fol. 29] Western District of Arkansas, Fort Smith Division, within thirty days from the filing of this petition in the said State Court for removal, a true and duly certified copy of the record of this suit as required by law, and shall pay, or cause to be paid all costs that may be awarded therein by said District Court of the United States, if the

Court shall hold that the suit was improperly or wrongfully removed thereto, then this obligation to be void. Otherwise, the same shall remain in full force and effect.

Harding Glass Company, by C. H. Harding, Prest.,
C. H. Harding, W. E. Harding.

The above bond has been approved and accepted.

—— ——, Circuit Judge of the Fort Smith District of Sebastian County.

We, C. H. Harding and W. E. Harding, in surety bond on the above bond of the Harding Glass Company, state on oath that we, and each of us, are possessed of more than $1,000 over and above all liabilities, same consisting of real and personal property located within Sebastian County, State of Arkansas.

C. H. Harding, W. E. Harding.

Subscribed and sworn to before me, the undersigned, this 14th day of August, 1925. R. H. Jackson, Notary Public. My commission expires August 1, 1926. (Seal.)

[File endorsement omitted.]

[fol. 30] Clerk's certificate to foregoing transcript omitted in printing.

IN UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF ARKANSAS, FORT SMITH DIVISION.

No. 1192

TWIN CITY PIPE LINE COMPANY, S. H. HALE, and INDUSTRIAL OIL & GAS COMPANY, Plaintiff,

vs.

HARDING GLASS COMPANY, Defendant

ANSWER OF HARDING GLASS COMPANY—Filed Oct. 22, 1925

Comes the defendant, the Harding Glass Company, and for answer and cross-complaint against the Twin City Pipe Line Company and S. H. Hale, alleges and states;

Prior to the 6th day of October, 1923, the Harding Glass Company was purchasing gas from the Twin City Pipe Line Company and its associates. In that year, and before the date last named the Harding Glass Company was contemplating installing an extensive and expensive machine glass plant. Before incurring the enormous expense which exceeds more than $100,000.00, to instal- a machine glass plant, the Harding Glass Company made an investigation so as to enable it to determine whether the supply of gas in this field was sufficient to justify such a large invest- [fol. 31] ment. At that time the Twin City Pipe Line Company and S. H. Hale were competitors in selling gas to consumers in this territory. S. H. Hale and the Twin City Pipe Line Company, through themselves and their associates or subsidiaries, were drilling wells in Crawford County, and a new gas field had been discovered, known as the Alma Gas Field. S. H. Hale, as an individual, found himself in possession of a large supply of gas. The Harding Glass Company made known to S. H. Hale and also to the Twin City Pipe Line Company, its desire and intention to construct and to install an expensive and large machine glass plant, provided sufficient gas would be available for several years to come to justify the Harding Glass Company in making the Investment. After due consideration of all the circumstances, and the gas supply, the Harding Glass Plant and S. H. Hale as an individual, entered into the following contract:

Contract

This Agreement, made and entered into this 6th day of October, 1923, by and between S. H. Hale, first party, and the Harding Glass Company, a corporation, doing business in Fort Smith, Arkansas, second party, Witnesseth:

That, Whereas, first party is an individual engaged in the production and sale of natural gas for profit, and desires to enter into a contract with second party to supply all of the requirements of gas for fuel of the two Harding Glass plants located at Fort Smith, Arkansas, the expense, responsibility and arrangements for the transportation by said first party of the gas to be used by the second party being fully assumed by the first party, and same in harmony with the state laws for "carriers" of such pro-

duction of gas by individual producers of gas, and second party is desirous of buying from first party all of the requirements of said glass plants of gas for fuel for operating said glass plants, under these arrangements; and

Whereas, the first party secures his supply of gas from his own wells and those of any other individual or companies with whom he has or may make contracts during the life of this contract, from the Williams, Kibler and Alma Gas fields, and also expects to obtain an additional supply from other gas fields, in Crawford County, Arkansas, and vicinity, and intends to supply the second party with gas secured from these sources;

Now, Therefore, in consideration of the mutual covenants herein continued, first party hereby agrees to sell natural [fol. 32] gas to the second party, and second party agrees to purchase said gas from the first party, upon the terms and conditions hereinafter set forth, to-wit:

1. First party agrees to sell gas to second party at said glass plants (not to exceed 3,000,000 cubic feet per day), and second party covenants and agrees to purchase and take gas from first party at said plants for all of the requirements of said plants for fuel for the sum and price of ten cents per thousand cubic feet for a period of five years from October 30, 1923, provided first party furnishes the same as hereinafter provided.

2. First party and his representatives shall at all times have access to the premises where the meter, recording gage, regulator, etc. are located, to read and inspect the same and to inspect the other apparatus used in connection therewith, and the second party shall have the same rights, but under no circumstances shall either party, or the representatives of either party, carry or introduce any lights or fires of any kind or character, except electric lights, in or about said meter or apparatus. Second party agrees to give prompt notice to first party of any and all leaks as soon after same have come to its notice as it conveniently can.

3. It is further mutually agreed that the gas to be supplied hereunder shall be measured on the basis of an eight-ounce pressure by orifice or proportional meter or meters set by first party, and computed according to standard tables and that if it is used by the second party at a greater

pressure than eight ounces shall be applied and the consumption of gas determined and paid for accordingly, and the first party shall at no time be required to furnish gas hereunder at a greater pressure than twenty pounds.

4. Each of the parties hereto shall have the right to have the meter or meters through which such gas is measured, tested at the expense of the party so desiring the test thereof, at any time, provided at least twenty-four hours' notice of such desire and test shall be given in writing to the other party hereto, and such test shall be made in the presence of representatives of both parties.

5. It is further mutually agreed by the parties hereto that the second party shall pay the first party on or before the 10th, day of each calendar month, succeeding the month in which the gas is sold to him as herein provided, the [fol. 33] amount shown to be due for all gas furnished during the preceding calendar month, and that in the event the second party shall be in default for a period of more than ten days after written notice given by the first party, in the payment for said gas so sold and furnished as hereinabove set out, this contract, at the option of the first party, shall become null and void, and the first party shall also in event of such default have the right to discontinue gas service to second party hereunder. The termination of this contract or ceasing to furnish gas hereunder for this or any other cause herein provided shall not release second party from its obligation to pay for gas already furnished to second party by first party hereunder.

6. First party does not guarantee absolutely to furnish to second party the gas or amount of gas herein contracted for, beyond the extent that the wells of said S. H. Hale and the wells of other gas producers from which first party may purchase gas will enable first party to do so. It is understood that no preference in the furnishing of gas is given to second party by this contract, but that the first party will, in the event of a shortage of gas sufficient to supply all of his customers, pro rate the gas available, as nearly as may be, proportionately among his industrial consumers, upon their written request, according to the amount of their requirements. And it is agreed that first party shall not be held responsible in damages or otherwise for any shortage or failure to furnish gas when the same is caused by the

failure of his supply in the field from which he obtains the gas reasonably accessable to the main pipe lines which first party employs or hires for the transportation of gas for the service herein, and neither party shall be liable for failure to furnish or take gas caused by breaks in the lines, explosions, strikes, fires, floods, injunctions or orders of courts or other governmental bodies, or other like or different accident of causes beyond first or second party's control; provided, however, that first party will at all times in good faith use his best efforts to procure said gas from the leases and holdings under his control or from parties from whom he has or may make contracts to buy gas to fulfill this contract, in the field or fields within a reasonable distance from the trunk pipe lines used for transporting gas for this service.

7: This contract and all rights accruing thereunder may be assigned by either of the parties hereto. This contract [fol. 34] and each and all of the provisions hereof shall extend to and be binding upon the heirs, successors, representatives, and assigns of the parties hereto.

In witness whereof S. H. Hale, first party, has hereunto set his hands, and the Harding Glass Company, second party, has caused these presents to be signed by its duly authorized officers and its corporate seal to be hereto affixed, by order of its board of directors, the day and year first above written.

(Signed) S. H. Hale, First Party. (Signed) The Harding Glass Company, by C. H. Harding, President, Second Party.

Attest: (Signed) W. E. Harding, Secretary. (Seal.)

The said contract was made by and between S. H. Hale owner of gas wells and the controller of the gas supply of the Clear Creek Oil & Gas Company, and probably other companies, and the Harding Glass Company, whereby S. H. Hale, as an individual, obligated and bound himself to furnish and supply to the Harding Glass Company all its requirements of gas, not to exceed 3,000,000 cubic feet per day, for the period of five years, beginning October 30, 1923. The said S. H. Hale is an individual, and was not at that time engaged in the business of a public utility, and

in making said contract, did not make the same as a public utility, but made the same as an individual, and obligated and bound himself as an individual to furnish said gas.

Immediately upon the making of said contract, the said S. H. Hale began the furnishing to the Harding Glass Company of all its requirements for gas, and the Harding Glass Company began taking said gas from S. H. Hale, and paid therefor the sum of ten cents 10c per thousand cubic feet, as provided in said contract.

Relying upon the said contract, and relying upon the ability and responsibility of said S. H. Hale to furnish said gas to the Harding Glass Company for all its requirements, the said Harding Glass Company made very heavy invest- [fol. 35] ments in the establishment of a machine glass plant, and additions to its other plants. The said Harding Glass Company made investments altogether exceeding Two Hundred Thousand Dollars ($200,000.00); said investments being made in constructing said plants upon the faith of said contract, and the obligations of said S. H. Hale therein, and upon the faith that said contract was legal, valid and binding, and that said S. H. Hale would fully perform the same. Some time after said contract was made, the said S. H. Hale and the corporations controlled by him, entered into some kind of agreements with the Twin City Pipe Line Company and the Industrial Oil and Gas Company for the sale by said S. H. Hale to the plaintiff herein, and its associates, of all the gas supply and al of the gas rights and contracts of said S. H. Hale. The defendant, the Harding Glass Company does not know the full and complete terms of said contracts between S. H. Hale and the Twin City Pipe Line Company and its associates. The defendant, the Harding Glass Company, is advised that some time after said Company had invested the large sums of money heretofore referred to in the plants hereinabove referred to, the Twin City Pipe Line Company entered upon a plan to acquire a complete monopoly of all the gas in this territory, including all the gas in Crawford County and Sebastian County, and in the adjoining state. Thereupon, the Twin City Pipe Line Company and its associates, through some kind of a contract, acquired from S. H. Hale the above contract, and undertook and obligated the Twin City Pipe Line Company to carry out fully and completely all the terms and obligations of said con-

tract during its life. The Twin City Pipe Line Company furnished gas under said contract above set forth during the year 1924, and up until January, 1925, thereby confirming and agreeing to all the terms and conditions of said contract. The Twin City Pipe Line Company knew at the time that it secured all the gas supply of S. H. Hale, and his companies, that the Harding Glass Company has invested large sums of money upon the faith that the Hale contract above set forth would be fully and completely carried out, and the Twin City Pipe Line Company legally took over said contract, and obligated and bound itself to perform all the terms and conditions thereof.

After the said S. H. Hale and the Harding Glass Company had entered into the contract above described, G. T. Cazort, an owner of large areas of land containing gas deposits, and an owner of leases and an owner of a large production of gas, attempted to make a contract with the [Vol. 36] Harding Glass Company to furnish the Harding Glass Company gas at a less figure than that which was paid by the Harding Glass Company to S. H. Hale, under said contract, and to the Twin City Pipe Line Company under said contract. The Harding Glass Company considered itself bound, between it and S. H. Hale, and declined to enter into any arrangement whereby it would secure its gas from G. T. Cazort and his associates. Thereafter, and for the purpose of removing all competition in the production and sale of gas in this community, the Twin City Pipe Line Company and its associates secured by contract with G. T. Cazort the supply of gas of said Cazort. Up until the Twin City Pipe Line Company thus secured a complete monopoly of all the gas in this community, the said Twin City Pipe Line Company took the position that said contract between the Harding Glass Company and S. H. Hale was legal, valid and binding, and never at any time questioned said contract. During all of that time, the Harding Glass Company was expending large sums of money, relying upon said contract, and the Twin City Pipe Line Company, knowing that, was at all times performing said contract, and went on in the performance of it, until it had secured the Cazort gas. Thereafter, and in January, 1925, the Twin City Pipe Line Company, after notifying the Harding Glass Company that it had secured

all of the obligations and terms of the Hale contract above set forth, attempted to charge a different price for the gas, claiming that the rate was higher than the rate fixed for said contract.

The Harding Glass Company has not sufficient information upon which to form a belief as to whether the City of Fort Smith has fixed a rate, such as that contended for by the plaintiff in this action, and therefore denies that the City of Fort Smith has fixed the rate set up in the complaint, and on which the Twin City Pipe Line Company bases this suit, and alleges that the contract between the Harding Glass Company and S. H. Hale was valid, legal and binding upon the parties thereto, and is legal, valid and binding upon the Twin City Pipe Line Company and its associates. Up until January, 1925, the Twin City Pipe Line Company never at any time claimed that said contract did not control the price, and it never contended that the contract did control the price until after it had secured by agreements, the nature of which are unknown to the Harding Glass Company an entire monopoly of all the gas in this community. The change of position in the Twin City Pipe Line is due to its monopolistic control of the entire [fol. 37] gas supply, and is not due to the fact that the gas price has been fixed by any regulatory body. The gas price between S. H. Hale and the Harding Glass Company has not been fixed by any regulatory body having authority to regulate said price of gas, and the Twin City Pipe Line Company is therefore bound and obligated under said contract, to furnish gas under the terms of said contract, until said contract is terminated. The Harding Glass Company is ready and willing to perform said contract, and has performed the same, and has paid all amounts due under said contract at the times when they became due, and when they are payable. The Twin City Pipe Line Company and S. H. Hale are both estopped to set up and claim that said contract is illegal and void, and they are estopped for the further reason that they stood by and encouraged the Harding Glass Company to invest enormous sums of money, which are described above, and knowing that said sums of money were invested upon the faith that said contract would be carried out.

Further answering, the Harding Glass Company denies that the Twin City Pipe Line Company is a public utility

in the sense that it cannot carry out the contract of S. H. Hale, which contract it has assumed and agreed to perform.

Further answering, the Harding Glass Company alleges that the Industrial Oil & Gas Company is a proper party to this proceeding, and said company is a corporation organized under the laws of the State of Arkansas, and is in a fact, one and the same corporation with the Twin City Pipe Line Company. The stockholders are substantially the same, and the officers are substantially the same, and the Industrial Oil & Gas Company claims to be a producing company, and the Twin City Pipe Line Company owns gas pipes and gas lines, and as such it is a common carrier, and is not entitled in law to deal in the purchase and sale of gas, which it carries, and at the same time transport gas as a public carrier. Its duty as a public carrier conflicts with its duty as a purchaser and seller of gas. It has not separated its duties. As a carrier, it is entitled to charge a reasonable sum for the transportation of gas, but it charges nothing to the Industrial Oil & Gas Company, as the Harding Glass Company is informed and so alleges.

The Harding Glass Company has not sufficient information upon which to form a belief therefore, as to whether the Twin City Pipe Line Company is a public utility, engaged in supplying natural gas to industries in Fort Smith [fol. 38] at rates fixed and established by the Board of Commissioners of the City of Fort Smith, and therefore denies the same. The Harding Glass Company also denies that rates have been fixed by any regulatory body, in accordance with the provision of Act 124 of the Acts of the General Assembly for the year 1921, and denies that the rate, if any has been established, fixes and controls the contract price between S. H. Hale and the Harding Glass Company, and alleges that said contract was valid when made, and that any order of any regulatory body of Arkansas attempting to change the terms of said contract is an effort to impair the obligations of said contract, and thereby violates Section 10 of Article One of the Constitution of the United States. The action of said regulatory body insofar as it relates to the contract between S. H. Hale and the Harding Glass Company, and now between the Twin City Pipe Line Company and the Harding Glass Company,

impairs the obligation of said contract, in violation of said section of the Constitution of the United States, and in violation of the rights of the Harding Glass Company, under said contract, and under said clause of the Constitution of the United States, and the effort of the Twin City Pipe Line Company to disregard the terms of said contract draws in question the proper construction to be placed upon said contract, and draws in question the rights of the Harding Glass Company under the clause of the Constitution of the United States above set forth.

The Harding Glass Company further answering, denies that it is obligated to pay for the gas furnished, any rate other than that fixed in said contract.

The Harding Glass Company denies that it is a corporation organized under the laws of the State of Arkansas, and alleges that it is a corporation organized and existing under the laws of the State of West Virginia, and has complied with the laws of Arkansas entitling it as a foreign corporation, to do business in the State of Arkansas. The Harding Glass Company denies that it is indebted to the Twin City Pipe Line Company in the sum of $5963.40, or any other sum.

Further complaining, the Harding Glass Company states that it is now operating its large machine glass plant, and also its hand glass plant, and in order to put said plants in operation, it expended the sums of money heretofore alleged, in constructing said plants, and in order to prepare said plants for making glass during the present current sea-[fol. 39] son, and relying upon said contract above described, the Harding Glass Company has expended for labor and other things upon each of its tanks, the sum of Five Thousand Dollars ($5,000.00), making a total expenditure of Ten Thousand Dollars ($10,000.00) in heating the tanks and preparing the raw material for the making of glass.

The said Harding Glass Company further alleges that, to abandon its present operation would entail a loss of at least Fifteen Thousand Dollars ($15,000.00), as an immediate loss, because of the disorganization of its business, and the breaking down of its organization. It now has an efficient organization which it has built up during several years, and if it be compelled to shut down its plants at this

time, its loss by reason of the disorganization of its system would amount to not less than Fifteen Thousand Dollars ($15,000.00). The Harding Glass Company relying upon said contract, has made contracts for the sale of glass, and has business on its books amounting to Fifty Thousand Dollars ($50,000.00), and more, and has agreed to manufacture glass, and if it should be compelled to shut down its plant by reason of unreasonable and unjust price for gas, its losses would be irreparable. It would lose at least Three Thousand Dollars ($3,000) on each of its furnaces, in addition to the sum above named, and its loss on its future trade and business would be irreparable and unmeasurable by any rule for the establishment of damages. It would be subjected to suits for breach of contract, and would have to respond in damages to the holders of the contracts with it for delivery of manufactured glass, and it cannot possibly estimate the enormous loss which it would suffer, if its gas supply should be at this time shut off, or if the price of its gas supply is raised so high that it cannot compete with its competitors.

The Harding Glass Company further alleges that the Twin City Pipe Line Company is furnishing gas to consumers in the neighborhood of Fort Smith at ten cents (10¢) per thousand cubic feet, the same as it now furnishes under the Hale contract, and the same as it has furnished under the Hale contract to the Harding Glass Company. The Harding Glass Company alleges that the Twin City Pipe Line Company, as the Harding Glass Company is advised and alleges, furnished gas to smelters in the neighborhood of Fort Smith at ten cents (10¢) per thousand cubic feet, and that such furnishing of gas at that price is an unlawful discrimination, and estops the Twin City Pipe [fol. 40] Line Company from attempting to charge the Harding Glass Company any sum in excess of the contract price.

The Harding Glass Company alleges that the Twin City Pipe Line Company and the Industrial Oil & Gas Company are corporations organized under the laws of the State of Arkansas, and S. H. Hale is a citizen and resident of the State of Missouri, and lives in Kansas City in said State of Missouri. The Harding Glass Company alleges that it has no complete remedy at law, and further alleges that the

Twin City Pipe Line Company, through its president, has indicated that the Twin City Pipe Line Company might cut off the supply of gas of the Harding Glass Company. If this supply of gas should be cut off, at any time while the Harding Glass Company is in operation, the said Harding Glass Company would loose more than $50,000.00, which loss would be brought about by its loss of trade, its liability to damages in fulfilling its contracts, and *the in* other items above set forth. The Harding Glass Company alleges that neither S. H. Hale nor the Twin City Pipe Line Company is entitled to cut off the supply of gas, and thus irreparably damage and injure the Harding Glass Company.

The Harding Glass Company alleges that the Industrial Oil & Gas Company should be made a party plaintiff to this cause of action, because the said Industrial Oil & Gas Company is one and the same with the Twin City Pipe Line Company, and the said Industrial Oil & Gas Company, as the Harding Glass Company believes, and so alleges, is interested in this contract between S. H. Hale and the Harding Glass Company.

S. H. Hale should be made a party plaintiff herein, to the end that the Harding Glass Company may have a judgment over against said S. H. Hale, for whatever sum, if any, the Twin City Pipe Line Company may recover, or may be permitted to recover against Harding Glass Company.

The said S. H. Hale under a contract with the Twin City Pipe Line Company has an interest which is local in its nature in the leases, and in the lands, pipe lines and other property conveyed by S. H. Hale and the companies controlled by him to the Twin City Pipe Line Company and the Industrial Oil & Gas Company. These Pipe Lines are located generally in Crawford County, and the lands held under lease are located in Crawford County, and are within the jurisdiction of this court.

As stated before, the plaintiff, S. H. Hale is a nonresident of the State of Arkansas, and the interest of said [fol. 41] S. H. Hale in the property above described is local in its nature and the Harding Glass Company is entitled to a judgment against S. H. Hale for whatever amount, if any, the Twin City Pipe Line Company may obtain against the Harding Glass Company, and said Judgment, if ob-

tained, can be enforced only by declaring a lien in favor of Harding Glass Company against S. H. Hale, and on all the property owned by said S. H. Hale, within the jurisdiction of this court.

The Harding Glass Company further alleges that it is entitled to a specific performance of the contract between S. H. Hale and the Harding Glass Company and the Twin City Pipe Line Company. The said S. H. Hale through some kind of a contract, the terms of which are not known to the Harding Glass Company, has attempted to assign his interest in the contract to the Twin City Pipe Line Company. The Harding Glass Company is not advised as to whether said assignment is valid or invalid, but does allege that the contract between the said S. H. Hale and the Harding Glass Company is a valid and binding contract, and the Harding Glass Company is entitled to a specific performance of said contract. The Harding Glass Company cannot be compensated in damages by any judgment against S. H. Hale. It operates its plants with a larger number of men, and is now actively engaged in the manufacture and sale of glass, and is fulfilling contracts throughout its trade territory. If said S. H. Hale is permitted to abandon said contract, and if the Twin City Pipe Line Company be permitted to shut off the supply of gas of the Harding Glass Company, irreparable injury will be done to the Harding Glass Company, and it will be compelled to close down its plants. It cannot operate its plants at a profit at the price of gas now demanded wrongfully by the Twin City Pipe Line Company.

The Harding Glass Company further alleges that since the assignment of said contract, or alleged assignment or purported assignment, the said S. H. Hale and the Twin City Pipe Line Company have entered into some kind of an arrangement, on account of which the Twin City Pipe Line Company is endeavoring to collect from the Harding Glass Company the rate for gas set forth in the complaint of the Twin City Pipe Line Company. This attitude and this conduct of S. H. Hale amounts to an effort to break the contract between said S. H. Hale and the Harding Glass Company. If said contract is broken, by said S. H. Hale, the Harding Glass Company will be compelled to close down its plants, as there is no other supply of gas which it can

[fol. 42] now obtain, which will enable it to compete with its competitors, and to supply its customers on contracts which were made by the Harding Glass Company upon the faith that S. H. Hale would carry out said contract. The said contract is intended to be carried out only in Crawford County and in Sebastian County, and the Harding Glass Company is entitled to have said contract specifically performed in Sebastian County and in Crawford County, and is entitled to have gas delivered in accordance with that contract. Any measure of damages that might be fixed by a court of law in favor of the Harding Glass Company against S. H. Hale would be and is wholly inadequate to compensate the Harding Glass Company for its losses in the event that said S. H. Hale should violate his contract and refuse to perform the same. Upon information and belief the Harding Glass Company alleges that there is some kind of an arrangement between the Twin City Pipe Line Company and S. H. Hale, whereby it is understood between them, that the Twin City Pipe Line Company will endeavor to increase the price of gas, as it is attempting to do by bringing and maintaining a suit of law, as shown in its complaint, and which suit, if permitted, would result in increasing the returns and compensation both of S. H. Hale and the Twin City Pipe Line Company.

The Harding Glass Company has no knowledge or information of any property of S. H. Hale located in the State of Arkansas, other than his interest in the property above described, and by reason of his being a non-resident of the State of Arkansas, the Harding Glass Company is entitled to have a lien declared against that property, and to have a decree against S. H. Hale requiring him to perform specifically the contract, and to furnish the gas as therein provided. The Harding Glass Company is entitled to an equitable lien, and in equity has an equitable lien upon the assets of S. H. Hale, in the hands of the Twin City Pipe Line Company, and has an equitable interest in the debt or debts that are owing from the Twin City Pipe Line Company and its associates to S. H. Hale, and his associates. Said S. H. Hale is not an inhabitant of the district where this suit is pending, but lives in the State of Missouri, in the City of Kansas City, as heretofore stated.

The Harding Glass Company further states that Clarence R. Jones, Secretary of the Clear Creek Oil & Gas Company, is in possession of the individual interests of S. H. Hale in [fol. 43] Crawford County, and in Sebastian County, and said Jones is the agent and representative of S. H. Hale, and is in possession and in charge of all the property of S. H. Hale above described.

The Harding Glass Company further alleges that upon the filing of this complaint, it through its counsel, gave notice to S. H. Hale of the bringing of this suit, and called upon the said S. H. Hale to appear and defend the same, and up to the time the said S. H. Hale has not voluntarily appeared in this action.

The Harding Glass Company alleges that it is solvent, and is able to pay for the gas furnished by the Twin City Pipe Line Company and S. H. Hale, and is ready and willing to pay for the same under the said contract, and is entirely solvent.

Premises considered, the Harding Glass Company prays:

1. That a summons be issued herein, and served upon S. H. Hale, together with a certified copy of this answer and cross-complaint.

2. That a summons be issued and served upon the Industrial Oil & Gas Company.

3. That S. H. Hale and the Twin City Pipe Line Company be restrained and enjoined from violating the contract between S. H. Hale and the Harding Glass Company, and that upon a final hearing said injunction be made perpetual.

4. For all other and further relief to which the Harding Glass Company may be entitled in equity.

5. That this cause be transferred to equity.

6. That the Court herein make an order, as provided by Section 57 of the Judicial Code, authorizing and directing service to be made upon said S. H. Hale, as provided in said Section 57 of the Judicial Code. The business address

of said S. H. Hale is, 919 Commerce Building, in Kansas City, in the State of Missouri.

(Signed) James B. McDonough, Solicitor for Harding Glass Company.

[fol. 44] *Duly sworn to by C. H. Harding. Jurat omitted in printing.*

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

No. 1192. Law

DEMURRER TO CROSS COMPLAINT—Filed Dec. 24, 1925

Now comes the Twin City Pipe Line Company and demurs to the cross complaint herein, because same does not state sufficient facts to constitute a counter claim or set off against this defendant.

Daily & Woods, Attorney for the Twin City Pipe Line Company.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

No. 1192. Law

TWIN CITY PIPE LINE COMPANY, Plaintiff,

vs.

HARDING GLASS COMPANY et al., Defendants

ORDER TRANSFERRING TO EQUITY AND CONSOLIDATING WITH CASE No. 448, EQUITY—February 15, 1926

In accordance with the stipulation of the parties hereto by their attorneys this day filed, which stipulation is lodged with the papers in case No. 448 Equity, Harding Glass Company vs. Twin City Pipe Line Company, et al., it is

[fol. 45] ordered by the court that this cause be and hereby is transferred to equity and consolidated with the said equity case No. 448.

In United States District Court, Western District of Arkansas, Fort Smith Division

No. 1200. Law

Twin City Pipe Line Company, Plaintiff,

vs.

Harding Glass Company, Defendant

Complaint at Law—Filed Dec. 2, 1925

Comes the plaintiff and for its cause of action against the defendant herein states:

The plaintiff is a corporation duly organized and existing under the laws of the State of Arkansas, with its principal place of business in the City of Fort Smith, in the Western District of Arkansas, and Fort Smith Division, thereof.

That the defendant is a corporation organized and existing under and by virtue of the laws of West Virginia, with its factory, office and principal place of business in the said city of Fort Smith, district and Division aforesaid.

That the plaintiff is a citizen of the state of Arkansas, and the defendant is a citizen of the State of West Virginia; that the controversy herein is, therefore, solely between citizens of different states. That the amount involved herein is in excess of the sum of $3,000.00, excluding interests and costs. That this suit is brought for the recovery of money due on an open acount for natural gas sold and delivered by plaintiff to defendant.

That plaintiff is engaged as a public utility in supplying natural gas to industries in the said city of Fort Smith, at rates fixed and established by order of the board of Commissioners of said city pursuant to the provisions of Act No. 124, of the Acts of the General Assembly of Arkansas for the year, 1921, approved February 15th, 1921; that the

rate so established by the order of the Board of Commissioner- of the city of Fort Smith, which was at the dates hereinafter mentioned and still is in effect at which the plaintiff shall sell and furnish gas to industries of said City of Fort Smith, is as follows:

For the first one million cubic feet of gas per month, 15¢ per thousand cubic feet.

[fol. 46] For the next one million cubic feet of gas per month, 14¢ per thousand cubic feet.

For the next one million cubic feet of gas per month, 13¢ per thousand cubic feet.

For all over three million cubic feet of gas per month, 12¢ per thousand cubic feet.

That during the months of July, August, September, and October, 1925, the plaintiff furnished and delivered to the defendant, in the City of Fort Smith, the following amounts of natural gas, which are used by said defendant at its Glass Factory is said City, to-wit:

July	39,708 M Cubic feet
August	41,264 M Cubic feet
Sept.	74,241 M Cubic feet
Oct.	88,582 M Cubic feet

That the amounts due and owing by the defendant to the plaintiff for said gas so furnished and delivered to the defendant in the City of Fort Smith is the sum of $29,494.68; that the defendant has paid to the plaintiff for said gas so furnished and delivered the sum of $24,378.90, leaving a balance due from the defendant to the plaintiff for said gas so furnished and delivered at the rate so fixed and established, and now in effect the sum of $5,115.78.

That there is attached hereto and made a part hereof as Exhibit A, an itemized statement showing the amount of gas furnished and delivered by the plaintiff to the defendant in the City of Fort Smith, during each of said months, the amount due by the defendant to the plaintiff under said rate for each month, together with an itemized statement of all payments made by the defendant to the plaintiff.

That the amount sued for herein matured and became payable as follows:

August 10, 1925	$854.04
September 10, 1925	885.28
October 10, 1925	154.82
November 10, 1925	831.64

[fol. 47] That each of said sums should bear interest at the rate of six per cent per annum from the date of its maturity until paid.

Wherefore, premises considered plaintiff prays judgment against the defendant in the sum of Five Thousand One Hundred Fifteen and 78/100 ($5,115.78) Dollars, together with interest calculated to the date of judgment at six per cent per annum from the dates and on the amounts set out in the preceding paragraph.

Daily & Woods, Attorneys for Plaintiff.

Duly sworn to by W. R. Martin. Jurat omitted in printing.

To Twin City Pipe Line Co., Dr.

	M cu. ft. purchased	Billed at 12 to 15¢	Paid at 10¢	Difference due
July	39,702,000	4,824.24	3,970.20	854.04
August	41,264,000	5,001.68	4,126.40	885.28
September	74,241,000	8,968.92	7,424.10	1,544.82
October	88,582,000	10,689.84	8,858.20	831.64
Totals	243,789,000	29,494.68	24,378.90	5,115.78

[File endorsement omitted.]

[fol. 48] In United States District Court

No. 1200. Law.

Answer and Cross-Complaint—Filed Dec. 8, 1925

Comes the defendant, Harding Glass Company, and for answer herein states as follows:

Defendant admits that the Twin City Pipe Line Company is a corporation organized and existing under the laws of the State of Arkansas, with its principal place of business in the City of Fort Smith, Western District of Arkansas, Fort Smith Division thereof, and alleges that

the Twin City Pipe Line Company is in equity and law one and the same with the Industrial Oil & Gas Company, the latter being a corporation organized under the laws of the State of Arkansas, having substantially the same officers, and, to a large extent, the same stockholders, and governed by the same interests, and substantially the same Board of Directors.

The defendant admits that it is a corporation, organized and existing under the laws of West Virginia, and has its principal place of business in the City of Fort Smith, Western District of Arkansas, Fort Smith Division.

The defendant admits that the controversy is between the citizens of different states, but denies that it is a controversy solely between the Twin City Pipe Line Company and the Harding Glass Company, but allege that S. H. Hale, a citizen of the State of Missouri, is a necessary and essential party to this litigation.

The defendant has not sufficient information upon which to form a belief as to whether the plaintiff is a public utility, and alleges that if it is a public utility, the Industrial Oil & Gas Company also is a public utility, but this defendant is without information as to whether said Industrial Oil & Gas Company is a public utility, but alleges that the plaintiff and the Industrial Oil & Gas Company have the same status, regardless of whether they are public utilities or not.

This defendant denies that the plaintiff is furnishing gas at rates established by the order of the Board of Commissioners of the City of Fort Smith, and alleges that the City of Fort Smith is without authority to fix rates, as between the plaintiff and this defendant, because of a contract hereinafter referred to, and because the price of said gas is governed and controlled by facts and circumstances out of and beyond the jurisdiction of the City of Fort Smith. This [fol. 49] defendant denies that the rates set forth in the complaint control the obligations of the contract between this defendant and the plaintiff. This defendant denies that it is indebted to the plaintiff in the sum of $5,115.78, or any other sum.

The defendant alleges that this suit is based upon the same contract and the same obligations of that contract which are fully set forth in the answer of this defendant in

another suit pending in this Court, which is numbered 1192 Law. This defendant attaches hereto and makes the same a part of this answer, its answer in said cause. In said cause, the Twin City Pipe Line Company, the same plaintiff as the one herein, is plaintiff, and this defendant is defendant.

This defendant alleges that the alleged cause of action in this complaint grows out of the same contract and the same facts as those set forth in the answer and cross-complaint of the Harding Glass Company in the other suit referred to which is No. 1192 Law herein.

This defendant alleges that since the filing of the answer and cross-complaint of this defendant in the other suit, the plaintiff herein has violated its contract set forth in the other answer and cross-complaint as herein shown. Under the contract between S. H. Hale referred to in the other answer and cross-complaint, and the Harding Glass Company, which contract has been fully adopted by the plaintiff herein, the plaintiff is compelled and required to furnish the Harding Glass Company gas at sufficient pressure that the same will enable the Harding Glass Company to manufacture glass. The plaintiff has wholly failed, neglected and refused to furnish this defendant with gas at the pressure required under said contract. This defendant alleges that on November 23, 1925, the plaintiff herein wholly failed, neglected and refused to comply with its contract and its obligation to furnish gas at the pressure required by the contract and by law, and by reason of said failure to furnish said gas, as required under said contract, the plaintiff herein will irreparably damage this defendant, if the plaintiff continues to fail to comply with said contract. On December 5, 1925, the plaintiff again failed, neglected and refused to furnish gas, as provided in said contract, and refused to perform its obligation to this defendant to furnish gas. This defendant alleges that said failure does an irreparable damage and injury to this defendant. This defendant is engaged in manufacturing [fol. 50] glass products. It is necessary to have sufficient heat at all times to keep the glass in a molten condition. Unless the glass is kept in that molton condition at [11] times, defendant cannot manufacture its glass. It requires

weeks — restore the molten glass to the proper condition for the manufacture of window glass and other products, and the failure to produce and furnish the quantity of gas by the plaintiff makes it impossible for the defendant to conduct its business without irreparable injury and loss.

Immediately upon the plaintiff's failing to furnish the gas, this defendant notified the plaintiff of its failure, and the plaintiff claimed that it was furnishing all the pressure that it could furnish. This defendant alleges the fact to be that at that very time, and all of the times, the plaintiff is furnishing to the competitors of this defendant ample gas at a good pressure, and satisfactory pressure, and at a different pressure from the gas furnished to this defendant although the gas comes into the City of Fort Smith through substantially the same pipe lines. At least, the gas is connected either in the City of Fort Smith or beyond the City of Fort Smith in the same pipe lines, and no reason exists why this defendant should not have the same pressure of gas that its competitors have, and the plaintiff is thereby wrongfully discriminating against this defendant, and by such wrongful discrimination will damage this defendant irreparably, and injure it irreparably by such failure, and by such discrimination. This defendant alleges that it is entitled to the same pressure of gas that all other industrial plants have that are similarly situated to this defendant. Among other plants, there are other glass manufacturing companies and those other companies have been furnished gas by the plaintiff with ample pressure at the very time that the plaintiff failed to furnish this defendant with gas at sufficient pressure.

The defendant alleges that it is entitled to a specific performance of the contract, which is set forth in the other [a] answer, and which contract is made a part of this answer. This defendant alleges that the plaintiff has ample and sufficient gas to furnish this defendant the same amount of gas, and at the same pressure that it is furnishing to its competitors in this field, and no reason exists why said gas should not be furnished with sufficient pressure. The defendant alleges that it has no adequate remedy at law, and that it is entitled to have this cause transferred to equity, as set forth in the answer and cross-complaint in the other [fol. 51] suit, and is now further entitled to have it transferred to equity, in order that this Court may issue a man-

datory injunction against the plaintiff herein, commanding and compelling the plaintiff to furnish gas to this defendant at the same pressure that it furnishes gas to the competitors of this defendant. This defendant alleges that unless this Court grants a temporary restraining order and preliminary injunction, the plaintiff will wholly fail and neglect to furnish gas to this defendant as it is obligated to do, and will thereby irreparably injure and damage this plaintiff in enormous sums of money, which can never be recovered. The defendant alleges that said sums of money cannot be recovered.

This defendant alleges that it is entitled to a decree compelling the plaintiff specifically to perform the contract between S. H. Hale and this defendant, and is also entitled to a decree compelling said S. H. Hale specifically to perform said contract. This right is based upon said contract, and the facts herein set forth.

In addition to the facts above alleged, this defendant states that the plaintiff fully carried out said contract between this defendant and S. H. Hale, until the plaintiff had secured a complete monoply of all the gas supplies in and around the vicinity of Fort Smith. Plaintiff purchased all the gas known as the Cazort gas. That gas until purchased by the plaintiff, was in competition with the plaintiff. Plaintiff purchased that gas, as this defendant believes, and so alleges, for the purpose of securing an absolute and complete monoply of all the gas consumed around Fort Smith and its environs, and including the City of Van Buren. The purpose of securing said monoply of gas was to enable the plaintiff to raise the rates, and to violate its contracts, and the result of such action is irreparably to injure and damage this defendant, as herein alleged.

This defendant is further entitled to a specific performance of said contract for the further reason that there is no supply of gas anywhere that can be obtained by this defendant for the purpose of carrying on its business of manufacturing glass products. This defendant has endeavored to secure a supply of gas in Poteau field. The persons in charge of that field, since the plaintiff in this case acquired the Cazort gas, have declined to furnish this defendant any gas whatever. There is therefore no supply of gas anywhere in this community where this defendant can ob-

tain gas to supply its needs, and to take the place of the [fol. 52] gas agreed to be furnished by the plaintiff and S. H. Hale. The plaintiff well knew, when it attempted and did secure a complete monoply of the gas, that this defendant would be helpless to get a supply of gas from any other source. The plaintiff apparently gladly and willingly complied with the Hale contract from the time that it purchased the same, and took over all the Hale properties until after it had [required] the Cazort gas, and had thus secured a complete monoply. Soon thereafter, the plaintiff notified this defendant in effect, that it would no longer fulfill the Hale contract, although the plaintiff herein had repeatedly agreed and assented that it would fill the Hale contract, and by its conduct had validated that contract, and made it good and valid, and had carried it out for a long period of time.

Premises considered, this defendant prays:

1. That this cause be transferred to equity, and consolidated with Cause No. 1192 Law, and that that cause also be transferred to equity.

2. That S. H. Hale be made a party defendant, or party plaintiff to this cause of action, and that the Industrial Oil & Gas Company be made a party plaintiff in this cause of action.

3. That a summons be issued against S. H. Hale, and served upon him, wherever he may be found, and that a summons be issued against the Industrial Oil & Gas Company.

4. That a temporary restraining order be issued against the plaintiff herein, compelling it to furnish gas to this defendant at the same pressure that it furnishes it to the competitors of this defendant until further order of Court.

5. That upon proper hearing, a preliminary injunction be made against the plaintiff, compelling it to furnish the gas as above set forth.

6. That at the final hearing herein, of both of these causes, that this defendant have judgment against S. H. Hale, and the plaintiff herein, for all damages which have been caused to this defendant, by reason of the failure of the plaintiff and S. H. Hale to furnish gas, as required by their contract.

7. That this defendant have all other and further relief.

8. That the preliminary injunction, at the Final hearing herein be made permanent.

[fol. 53] 9. That the defendant recover all its costs, and that it have all other and further relief to which it may be entitled in law and equity.

James B. McDonough, Attorney for Harding Glass Company.

Duly sworn to by C. H. Harding. Jurat omitted in printing.

(Filed February 15, 1926. William S. Wellshear, Clerk. R. F. Salzman, Deputy Clerk.)

Affidavit

STATE OF ARKANSAS,
County of Sebastian, ss:

I, C. H. Harding, on oath state that in addition to the matters set forth in the answer and cross complaint, I further state taht the Harding Glass Company employs, and now has in its employ, over five hundred (500) persons. The wages paid out to these individuals amounts to the sum of — Dollars ($—) per week.

—— ——.

Subscribed and sworn to before me this 8th day of December, 1925. —— ——, Notary Public. My commission expires April 16, 1929.

[fol. 54] IN UNITED STATES DISTRICT COURT

No. 1200. Law

DEMURRER TO CROSS-COMPLAINT—Filed December 24, 1925

Now comes the Twin City Pipe Line Company and demurs to the cross complaint herein, because same does not state

sufficient facts to constitute a counter claim or set off against this defendant.

Daily & Woods, Attorneys for Twin City Pipe Line Company.

[File endorsement omitted.]

IN THE UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF ARKANSAS, FORT SMITH DIVISION

No. 1200. Law

TWIN CITY PIPE LINE COMPANY, Plaintiff,

vs.

HARDING GLASS COMPANY, Defendant

AMENDMENT TO COMPLAINT—Filed Feb. 15, 1926

Now comes the plaintiff and by permission of the court files this amendment to its complaint:

It re-affirms all of its allegations in the original complaint in this cause, and in addition thereto says that since the filing of said original complaint that it has during the months of November and December, 1925, and January, 1926, furnished and delivered to the defendant in the city of Fort Smith the following amounts of natural gas, which were used by said defendant at its industries in the city of Fort Smith, to-wit:

November, 1925	87,055 M. cubic feet.
December, 1925	86,857 M. cubic feet.
January, 1926	87,325 M. cubic feet.

That the amount due and owing by the defendant to the plaintiff for said gas so furnished and delivered during said three months is the sum of $31,538.44; that the defendant has paid to the plaintiff for said gas so furnished and delivered the sum of $26,123.70, leaving a balance due from the defendant to the plaintiff for said gas so furnished and delivered for said three months, at the rate so fixed and [fol. 55] established by the City Commissioners, and now in

effect, the sum of $5,404.74, with interest. That there is attached hereto and made a part hereof, as "Exhibit A", an itemized statement showing the amount of gas furnished by the plaintiff to the defendant in the city of Fort Smith, during each of said months, the amount due by defendant to the plaintiff under said rate for each month, together with an itemized statement of all payments made by defendant to the plaintiff.

Wherefore, the premises considered, plaintiff prays judgment against the defendant in the additional sum of Five Thousand Four Hundred Four and 74/100 Dollars ($5,404.74), together with interest at the rate of six per cent per annum until the date of judgment.

Daily & Woods, Attorneys for Twin City Pipe Line Company.

Harding Glass Company, Dr., to Twin City Pipe Line Company

Month		M cu. ft. at 12 to 15¢	Paid	Balance
Nov. 1925	87,055	10,506.60	8,705.50	1,801.10
Dec. "	86,857	10,482.84	8,685.70	1,797.14
Jan. 1925	87,325	10,539.00	8,732.50	1,806.50
Totals	261,237	31,538.44	26,123.70	5,404.74

[File endorsement omitted.]

In United States District Court

No. 1200. Law

Twin City Pipe Line Company, Plaintiff,

vs.

Harding Glass Company et al., Defendant.

Order Transferring to Equity and Consolidating with Case No. 448, Equity—February 15, 1926

This day comes the plaintiff by Harry P. Daily its attorney and by leave of court files amendment to its complaint in the above entitled cause.

Thereupon, in accordance with the stipulation of counsel this day filed, which stipulation is lodged with the papers in [fol. 56] case No. 448 Equity, Harding Glass Company vs. Twin City Pipe Line Company et al., it is ordered by the court that this cause be and is hereby transferred to equity and consolidated with said equity case No. 448.

IN THE UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF ARKANSAS, FORT SMITH DIVISION, SITTING IN EQUITY

No. 448. Equity

HARDING GLASS COMPANY, Plaintiff,

vs.

TWIN CITY PIPE LINE COMPANY, S. H. HALE, and INDUSTRIAL OIL & GAS COMPANY, Defendants

COMPLAINT IN EQUITY—Filed December 11, 1925

Comes the plaintiff, and for cause of action against the defendants states as follows:

Plaintiff is a corporation organized under the laws of the State of West Virginia, and has compiled with the laws of the State of Arkansas, authorizing it to do business in the State of Arkansas, and has its principal office and place of business in the City of Fort Smith, State of Arkansas

The defendant, S. H. Hale, is a citizen and resident of the State of Missouri, and resides in Kansas City in said State, as the plaintiff is informed and believes and so alleges. The defendant, Twin City Pipe Line Company, is a corporation organized under the laws of the State of Arkansas, and has its principal office in the City of Fort Smith, Arkansas, and W. R. Martin is president of said Twin City Pipe Line Company, upon whom service of summons may be had. The defendant, Industrial Oil & Gas Company, is a corporation, organized under the laws of the State of Arkansas, and has its principal office and place of business in the City of Fort Smith, Arkansas, and owns and operates gas wells in Crawford County, and its president is the same as the president of the Twin City Pipe Line Company.

The plaintiff and the defendants are therefore citizens and residents of different states. The amount in controversy herein, exclusive of interest and costs, exceeds the sum of Three Thousand Dollars ($3,000.00).

The plaintiff herein, upon information and belief alleges that the Twin City Pipe Line Company and the Industrial [fol. 57] Oil & Gas Company are substantially one and the same corporation. They have substantially the same stockholders, and the same officers, and are controlled by the same persons.

The plaintiff herein is a manufacturer of glass products, and owns two large plants in the City of Fort Smith. Gas is the chief fuel used in the manufacture of glass products. It is impossible under present conditions, to manufacture the glass products without a good supply of natural gas. The Twin City Pipe Line Company and the Industrial Oil & Gas Company together, produce gas, and sell it in the City of Fort Smith and elsewhere.

On the 6th day of October, 1923, the plaintiff and S. H. Hale as an individual, entered into a contract, whereby said S. H. Hale, his successors and assigns obligated and bound themselves to supply to the plaintiff herein, for the period of five years, all gas to be used by the plaintiff in the manufacture of glass products. The said contract is in words and figures as follows:

Contract

This Agreement, made and entered into this 6th day of October, 1923, by and between S. H. Hale, first party, and the Harding Glass Company, a corporation doing business in Fort Smith, Arkansas, second party, Witnesseth:

That whereas first party is an individual engaged in the production and sale of natural gas for profit; and desires to enter into a contract with second party to supply all of the requirements of gas for a fuel of the two Harding Glass plants located at Fort Smith, Arkansas, the expense, responsibility and arrangements for the transportation by said first party of the gas to be used by the second party being fully assumed by first party, and same in harmony with the state laws for carriers of such production of gas by individual producers of gas, and second party is desirous of buying from first party all of the requirements of said glass

plants of gas for fuel for operating said glass plants, under these arrangements; and

Whereas, first party secures his supply of gas from his own wells and those of any other individuals or companies with whom he has or may make contracts during the life of this contract, from the Williams, Kibler, and Alma gas fields, and also expects to obtain an additional supply from other gas fields in Crawford County, Arkansas, and vicinity, [fol. 58] and intends to supply the second party with gas secured from these sources:

Now Therefore, in consideration of the mutual covenants herein contained, first party hereby agrees to sell natural gas to second party, and second party agrees to purchase said gas from first party, upon the terms and conditions hereinafter set forth, to-wit:

1. First party agrees to sell gas to second party at said glass plants (not to exceed 3,000,000 cubic feet per day), and second party covenants and agrees to purchase and take gas from first party at said plants for all of the requirements of said plants for fuel, for the sum and price of ten cents per thousand cubic feet, for a period of five years from October 30, 1923, provided first party furnishes the same as hereinafter provided.

2. First party and his representatives shall at all times have access to the premises where the meter, recording gage, regulator, etc. are located, to read and inspect the same and to inspect the other apparatus used in connection therewith, and the second party shall have the same rights, but under no circumstances shall either party, or the representatives of either party, carry or introduce any lights or fires of any kind or character, except electric lights, in or about said meter or apparatus. Second party agrees to give prompt notice to first party of any and all leaks as soon after the same have come to its notice as it conveniently can.

3. It is further mutually agreed that the gas to be supplied hereunder shall be measured on the basis of an eight ounce pressure by orifice or proportional meter or meters set by first party, and computed according to standard tables, and that if it be used by the second party at a greater pressure, that the multiple ordinarily used in computing the flow of gas at a higher pressure than eight ounces shall be applied and the consumption of gas determined and paid for

accordingly, and the first party shall at no time be required to furnish gas hereunder at a greater pressure than twenty pounds.

4. Each of the parties hereto shall have the right to have the meter or meters through which such gas is measured, tested at the expense of the party so desiring the test thereof, at any time, provided at least twenty-four hours' notice of such desire and test shall be given in writing to the other party hereto, and such test shall be made in the presence of representatives of both parties.

[fol. 59] 5. It is further mutually agreed by the parties hereto that the second party shall pay the first party on or before the 10th day of each calendar month, succeeding the month in which the gas is sold to him as herein provided, the amount shown to be due for all gas furnished during the preceding calendar month, and that in the event the second party shall be in default for a period of ten days after written notice given by the first party, in the payment for said gas so sold and furnished as hereinabove set out, this contract, at the option of the first party, shall become null and void, and first party shall also in the event of such default have the right to discontinue gas service to second party hereunder. The termination of this contract or ceasing to furnish gas hereunder for this or any other cause herein provided shall not release second party from its obligation to pay for gas already furnished to second party by first party hereunder.

6. First party does not guarantee absolutely to furnish to second party the gas or amount of gas herein contracted for, beyond the extent that the wells of said S. H. Hale and the wells of other gas producers from which the first party may purchase gas will enable first party to do so. It is understood that no preference in the furnishings of gas is given to second party by this contract, but that first party will, in the event of a shortage of gas sufficient to supply all his customers, pro rata the gas available as nearly as may be, proportionally among his industrial consumers, upon their written request, according to the amount of their requirements. And it is agreed that first party shall not be held responsible in damages or otherwise for any shortage or failure to furnish gas when the same is caused by the failure of his supply in the field from which he

obtains the gas reasonably accessible to the main lines which first party employs or hires for the transportation of gas for the service herein, and neither party shall be liable for failure to furnish or take gas caused by breaks in the lines, explosions, strikes, fires, floods, injunctions or orders of courts or other governmental bodies, or other like or different accidents or causes beyond first or second party's control; provided however, that first party will at all times in good faith use his best efforts to procure said gas from the leases and holdings under his control or from parties from whom he has or may make contracts to buy gas to fulfill this contract in the field or fields within a reasonable distance from the trunk pipe lines used for transporting gas for this service.

[fol. 60] 7. This contract and all rights accruing thereunder may be assigned by either of the parties thereto. This contract and each and all of the provisions hereof shall extend to and be binding upon the heirs, successors, representatives and assigns of the parties hereto.

In witness whereof S. H. Hale, first party, has hereunto set his hand, and the Harding Glass Company, second party, has caused these presents to be signed by its duly authorized officers and its corporate seal to be hereto, affixed, by order of its board of directors, the day and year first above written.

(Signed) S. H. Hale, First Party. The Harding Glass Company, (Signed) by C. H. Harding, President, Second Party.

Attest: (Signed) W. E. Harding, Secretary. (Seal.)

The said contract was made by and between S. H. Hale, owner of gas wells and the controller of the gas supply of the Clear Creek Oil & Gas Company, and probably other companies, and the Harding Glass Company, whereby S. H. Hale is an individual, obligated and bound himself to furnish and to supply the Harding Glass Company all its requirements of gas not to exceed 3,000,000 cubic feet per day, for the period of five years, beginning October 30, 1923. The said S. H. Hale is an individual, and was not at that time engaged in the business of a public utility, and in making said contract, did not make the same as a public

utility, but made the same as an individual, and obligated and bound himself as an individual, to furnish said gas.

Immediately upon making of said contract, the said S. H. Hale began the furnishing to the Harding Glass Company of all its requirements of gas, and the Harding Glass Company began taking said gas from said S. H. Hale, and paid therefore the sum of ten cents (10¢) per thousand cubic feet, as provided in said contract.

Relying upon the said contract, and relying upon the ability and responsibility of said S. H. Hale to furnish said gas to the Harding Glass Company for all its requirements, the said Harding Glass Company made very heavy investments [fol. 61] in the establishment of a machine glass plant and additions to its other plants. The said Harding Glass Company made investments altogether exceeding Two Hundred Thousand Dollars ($200,000.00); said investments being made in constructing said plants upon the faith of said contract, and the obligations of said S. H. Hale therein, and upon the faith that said contract was legal, valid and binding, and that said S. H. Hale would fully perform the same. Some time after said contract was made, the S. H. Hale and the corporations controlled by him, entered into some kind of agreements with the Twin City Pipe Line Company and the Industrial Oil & Gas Company for the sale by said S. H. Hale to the plaintiff herein, and its associates, of all the gas supply and all the gas rights and contracts of said S. H. Hale. The plaintiff, the Harding Glass Company, does not know the full and complete terms of said contracts between S. H. Hale and the Twin City Pipe Line Company, and its associates. The plaintiff, the Harding Glass Company, is advised that some time after said company had invested the large sums of money heretofore referred to in the plants hereinabove referred to, the Twin City Pipe Line Company entered upon a plan to acquire a complete monopoly of all the gas in this territory, including all the gas in Crawford County and Sebastian County, and in the adjoining state. Thereupon, the Twin City Pipe Line Company and its associates, through some kind of a contract, acquired from S. H. Hale the above contract, and undertook, and obligated the Twin City Pipe Line Company to carry out fully and completely all the terms and obligations of said contract during its life.

The Twin City Pipe Line Company furnished gas under said contract above set forth during the year 1924, and up until January, 1925, thereby confirming and agreeing to all the terms and conditions of said contract. The Twin City Pipe Line Company knew at the time that it secured all the gas supply of S. H. Hale, and his companies, that the Harding Glass Company had invested large sums of money upon the faith that *that* the Hale contract above set forth would be fully and completely carried out, and the Twin City Pipe Line Company legally took over said contract, and obligated and bound itself to perform all the terms and conditions thereof.

After the said S. H. Hale and the Harding Glass Company had entered into the contract above described, C. T. Cazort, an owner of large areas of land containing gas [fol. 62] deposits, and an owner of leases and an owner of a large production of gas, attempted to make a contract with the Harding Glass Company to furnish the Harding Glass Company gas at a less figure than that which was paid by the Harding Glass Company to S. H. Hale, under said contract, and to the Twin City Pipe Line Company under said contract. The Harding Glass Company considered itself bound, between it and S. H. Hale, and declined to enter into any arrangement whereby it would secure its gas from C. T. Cazort, and his associates. Thereafter, and for the purpose of removing all competition in the production and sale of gas in this community, the Twin City Pipe Line Company and its associates secured by contract with C. T. Cazort, the supply of gas of said Cazort. Up until the Twin City Pipe Line Company thus secured a monopoly of all the gas in this community, the said Twin City Pipe Line Company took the position that said contract between the Harding Glass Company and S. H. Hale was legal, valid and binding, and never at any time questioned said contract. During all of that time the Harding Glass Company was expending large sums of money relying upon said contract, and the Twin City Pipe Line Company, knowing that, was at all times performing said contract, and went on in the performance of it, until it had secured the Cazort gas. Thereafter, and in January, 1925, the Twin City Pipe Line Company, after notifying the Harding Glass Company that it had secured all of the obligation and terms of the Hale contract above set forth, attempted to charge a different

price for the gas, claiming that the rate was higher than the rate fixed for said contract.

The Twin City Pipe Line Company, and as the plaintiff believes upon information, the Industrial Oil & Gas Company, undertook and did comply with said contract from the time that the same was taken over by said corporations; the deal being in the name of the Twin City Pipe Line Company, until in January, 1925. Said contract is a legal, valid and binding contract between plaintiff herein and the Twin City Pipe Line Company, and S. H. Hale. The Twin Pipe Line Company is the successor of S. H. Hale and the assignee of S. H. Hale in said contract, and the Twin City Pipe Line Company is bound by all the terms and conditions of said contract.

Up until January, 1925, the Twin City Pipe Line Company never at any time claimed that said contract did not control the price, and it never contended that the contract did control the price until after it had secured by agreements, the nature of which are unknown to the Harding [fol. 63] Glass Company, an entire monopoly of all the gas in this community. The change of position in the Twin City Pipe Line Company is due to the monopolistic control of the entire gas supply, and it is not due to the fact that the gas price has been fixed by any regulatory body. The gas price between S. H. Hale and the Harding Glass Company has not been fixed by any regulatory body having authority to regulate said price of gas, and the Twin City Pipe Line Company is therefore bound and obligated under said contract, to furnish gas under the terms of said contract, until said contract is terminated. The Harding Glass Company is ready and willing to perform said contract, and has performed the same, and has paid all the amounts due under said contract at the times when they become due, and when they are payable. The Twin City Pipe Line Company and S. H. Hale are both estopped to set up and claim that said contract is illegal and void, and they are estopped for the further reason that they stood by and encouraged the Harding Glass Company to invest enormous sums of money, which are described above, and knowing that said sums of money were invested upon the faith that said contract would be carried out.

Further complaining, the Harding Glass Company states that it is now operating its large machine glass plant, and

also its hand glass plant, and in order to put said plants in operation, it has expended the sums of money heretofore alleged, in constructing said plants, and in order to prepare said plants for making glass during the present current season, and relying upon said contract above described, the Harding Glass Company has expended for labor and other things upon each of its tanks, the sum of Five Thousand Dollars ($5,000.00), making a total expenditure of ten thousand Dollars ($10,000.00), in heating the tanks and preparing the raw material for the making of glass.

The said Harding Glass Company further alleges that, to abandon its present operation would entail a loss of at least Fifteen Thousand Dollars ($15,000.00), as an immediated loss, because of the disorganization of its business, and the breaking down of its organization. It now has an efficient organization which it has built up during several years, and if it were compelled to shut down its plant at this time, its loss by reason of the disorganization of its system would amount to not less than Fifteen Thousand Dollars ($15,000.00). The Harding Glass Company, relying upon said contract, has made contracts for the sale of glass, and has business on its books amounting to Fifty Thousand [fol. 64] Dollars ($50,000.00), and more, and has agreed to manufacture glass, and if it should be compelled to shut down its plant by reason of an unreasonable and unjust price for gas its loss would be irreparable. It would lose at least Three Thousand Dollars ($3,000.00), on each of its furnaces, in addition to the sum above named, and its loss on its future trade and business would be irreparable and unmeasurable by any rule for the establishment of damages. It would be subjected to suits for breach of contract, and would have to respond in damages to the holders of the contracts with it for the delivery of manufactured glass, and it cannot possibly estimate the enormous loss which it would suffer, if its gas supply should at this time be shut off, or if the price of its gas is raised so high that it cannot compete with its competitors.

The Harding Glass Company further alleges that the Twin City Pipe Line Company is furnishing gas to consumers in the neighborhood of Fort Smith, at ten cents (10¢) per thousand cubic feet, the same as it now furnishes under the Hale contract, the same as it has furnished under

the Hale contract to the Harding Glass Company. The Harding Glass Company alleges that the Twin City Pipe Line Company, as the Harding Glass Company is advised and alleges, furnishes gas to smelters in the neighborhood of Fort Smith at ten cents (10¢) per thousand cubic feet, and that such furnishing of gas at that price is an unlawful discrimination, and estops the Twin City Pipe Line Company from attempting to charge the Harding Glass Company any sum in excess of the contract price.

The Harding Glass Company alleges that the Twin City Pipe Line Company and the Industrial Oil and Gas Company are corporations organized under the laws of the State of Arkansas, and S. H. Hale is a citizen and resident of the State of Missouri, and lives in Kansas City in said State of Missouri. The Harding Glass Company alleges that it was no complete remedy at law, and further alleges that the Twin City Pipe Line Company, through its president, has indicated that the Twin City Pipe Line Company might cut off the supply of the gas of the Harding Glass Company. If this supply of gas should be cut off, at any time while the Harding Glass Company is in operation, the said Harding Glass Company would lose more than $50,000.00, which loss would be brought about by its loss of trade, its liability to damages in fulfilling its contracts, and in the other items above set forth. The Harding Glass [fol. 65] Company alleges that neither S. H. Hale nor the Twin City Pipe Line Company is entitled to cut off the supply of gas, and thus irreparably damage and injure the Harding Glass Company.

The Harding Glass Company further alleges that it is entitled to a specific performance of the contract between S. H. Hale and the Harding Glass Company and the Twin City Pipe Line Company. The said S. H. Hale, through some kind of a contract, the terms of which are not known to the Harding Glass Company, has attempted to assign his interest in the contract to the Twin City Pipe Line Company. The Harding Glass Company is not advised as to whether said assignments is valid or invalid, but does allege that the contract between the said S. H. Hale and the Harding Glass Company is a valid and binding contract, and the Harding Glass Company is entitled to a specific

performance of said contract. The Harding Glass Company cannot be compensated in damages by any judgment against S. H. Hale. It operates its plants with a large number of men, and is now actively engaged in the manufacture and sale of glass, and is fulfilling contracts throughout its trade territory. If said S. H. Hale be permitted to abandon said contract, and if the Twin City Pipe Line Company be permitted to shut off the supply of gas of the Harding Glass Company, irreparable injury will be done to the Harding Glass Company, and it will be compelled to close down its plants. It cannot operate its plants at a profit at the price for gas now demanded wrongfully by the Twin City Pipe Line Company.

The Twin City Pipe Line Company has attempted to break said contract, which is binding upon it, and which it assumed, which is the contract between S. H. Hale and the Harding Glass Company, and is attempting to charge the Harding Glass Company a higher rate for gas than that provided for in said contract. There is some kind of an arrangement the nature of which is not known to the plaintiff, between the Twin City Pipe Line Company and S. H. Hale, whereby the Twin City Pipe Line Company is paying to S. H. Hale a certain price by month, or by the year for the property sold by S. H. Hale, and his companies to the Twin City Pipe Line Company and the Industrial Oil & Gas Company. The contract or agreement the nature of which is known to the plaintiff, which exists between S. H. Hale and the Twin City Pipe Line Company, amounts to an [fol. 66] effort to break the contract between said S. H. Hale and the Harding Glass Company. If said contract is broken by said S. H. Hale, the Harding Glass Company will be compelled to close down its plants, as there is no other supply of gas which it can now obtain, which will enable it to compete with its competitors, and to supply its customers on contracts which were made by the Harding Glass Company upon the faith that S. H. Hale would carry out said contract. The said contract is intended to be carried out only in Crawford County and in Sebastian County, and the Harding Glass Company is entitled to have said contract specifically performed in Sebastian County and in Crawford County, and is entitled to have gas delivered in accordance with that contract. Any measure of damages

that might be fixed by a Court of law in favor of the Harding Glass Company against S. H. Hale would be and is wholly inadequate to compensate the Harding Glass Company for its losses in the event that said S. H. Hale should violate his contract and refuse to perform the same.

Upon information and belief the Harding Glass Company alleges that there is some kind of an agreement between the Twin City Pipe Line Company and S. H. Hale, whereby it is understood between them, that the Twin City Pipe Line Company will endeavor to increase the price of gas, as it is attempting to do by bringing and maintaining a suit at law, as shown in its complaint, and which suit if permitted, would result in increasing the returns and compensation both of S. H. Hale and the Twin City Pipe Line Company.

The Harding Glass Company had no knowledge or information of any property of S. H. Hale located in the State of Arkansas, other than his interest in the property above described, and by reason of his being a nonresident of the State of Arkansas, the Harding Glass Company is entitled to have a lien declared against that property, and to have a decree against S. H. Hale requiring him to perform specifically the contract, and to furnish the gas as provided therein. The Harding Glass Company is entitled to an equitable lien, and in equity has no equitable lien upon the assets of S. H. Hale, in the hands of the Twin City Pipe Line Company, and has an equitable interest in the debt or debts that are owing from the Twin City Pipe Line Company and its associates to S. H. Hale, and his associates. Said S. H. Hale is not an inhabitant of the district where this suit is pending, but lives in the State of Missouri, in the City of Kansas City, as heretofore stated.

[fol. 67] The Harding Glass Company further states that Clarence R. Jones, Secretary of the Clear Creek Oil & Gas Company, is in possession and of the individual interests of S. H. Hale in Crawford County, and in Sebastian County, and said Jones is the agent and representative of S. H. Hale and is in possession and in charge of all the property of S. H. Hale above described.

The plaintiff alleges that the Twin City Pipe Line Company and S. H. Hale are attempting to violate the contract above set forth, and are failing to furnish to the plaintiff the amount of gas provided in said contract. The Twin City

Pipe Line Company has at this time a complete monopoly of all the gas in the City of Fort Smith and its environs. The plaintiff cannot secure any supply of gas to take the place of that which the Twin City Pipe Line Company and S. H. Hale have failed to furnish under the terms of said contract. The plaintiff is not able to secure any supply of gas anywhere else. The said defendants have wholly failed, neglected and refused to furnish the plaintiff with gas at the pressure required under said contract.

The plaintiff alleges that on November 23, 1925, defendant Twin City Pipe Line Company wholly failed, neglected and refused to comply with its contract and its obligation to furnish gas at the pressure required by the contract and by law, and by reason of said failure to furnish said gas, as required under said contract, the said defendant will irreparably damage this plaintiff, if the defendant continues to fail to comply with said contract. On December 5, 1925, the defendant again failed, neglected and refused to furnish gas, as provided in said contract, and refused to perform its obligation to this plaintiff to furnish gas. This plaintiff alleges that said failure does an irreparable damage and injury to this plaintiff. This plaintiff is engaged in manufacturing glass products. It is necessary to have sufficient heat at all times to keep the glass in a molten condition. Unless the glass is kept in that molten condition at all times, plaintiff cannot manufacture its glass. It requires weeks to restore the molten glass to the proper condition for the manufacture of window glass and other products, and the failure to produce and furnish the quantity of gas to the plaintiff, makes it impossible for plaintiff to conduct its business without irreparable injury and loss.

Immediately upon the said defendant's failing to furnish the gas, this plaintiff notified the defendant of its failure, and the said defendant claimed that it was furnishing all [fol. 68] the pressure that it could furnish. This plaintiff alleges the fact to be that at that very time, and at all times, the said defendant is furnishing to the competitors of this plaintiff ample gas at a good pressure, and satisfactory pressure, and at different pressure from the gas furnished to this plaintiff, although the gas comes into the City of Fort Smith through substantially the same pipe lines. At least the gas is connected either in the City of Fort Smith or beyond the City of Fort Smith in the same pipe lines,

and no reason exists why this plaintiff should not have the same pressure of gas that its competitors have, and the said defendant is thereby wrongfully discriminating against this plaintiff, and by such wrongful discrimination will damage this defendant irreparably, and injure it irreparably by such failure, and by such discrimination. This plaintiff alleges that it is entitled to the same pressure of gas that all other industrial plants have that are similarly situated to this plaintiff. Among other plants, there are other glass manufacturing plants; and those other companies have been furnished gas by said defendant with ample pressure at the very time that the said defendant failed to furnish this plaintiff with gas at sufficient pressure.

The plaintiff alleges that it is entitled to a specific performance of the contract, which is set forth in the other paragraphs above, and which contract is made a part of this complaint. This plaintiff alleges that the said defendant, Twin City Pipe Line Company has ample and sufficient gas to furnish this plaintiff the same amount of gas, and at the same pressure that it is furnishing to its competitors in this field and no reason exists why said gas should not be furnished with sufficient pressure.

The plaintiff alleges that it has no adequate remedy at law, and that it is entitled to have a mandatory injunction against the defendant Twin City Pipe Line Company, commanding and compelling said defendant to furnish gas to this plaintiff at the same pressure that it furnishes gas to the competitors of this plaintiff. This plaintiff alleges that unless this court grants a temporary restraining order and preliminary injunction said defendant will wholly fail and neglect to furnish gas to the plaintiff, as it is obligated to do, and will thereby irreparably [*unjure*] and damage this plaintiff in enormous sums of money, which can never be recovered. This plaintiff alleges that said sums of money cannot be recovered.

[fol. 69] This plaintiff alleges that it is entitled to a decree compelling said defendant specifically to perform the contract between S. H. Hale and plaintiff, and is also entitled to a decree compelling said S. H. Hale specifically to perform said contract. This right is based upon said contract, and the facts herein set forth.

In addition to the facts above alleged, this plaintiff states that the Twin City Pipe Line Company duly carried out said

contract between this plaintiff and S. H. Hale, until said defendant had secured a complete monoply of all the gas supplies in and around the vicinity of Fort Smith. Said defendant purchased all the gas known as the Cazort gas. That gas, until purchased by said defendant, was in competition with the said defendant. Said defendant purchased that gas, as this plaintiff believes, and so alleges, for the purpose of securing an absolute and complete monoply of all the gas consumed around Fort Smith and its environs, and including the City of Van Buren. The purpose of securing said monopoly of gas was to enable the said defendant to raise the rates, and to violate its contracts, and the result of such action is irreparably to injure and damage this plaintiff, as herein alleged.

This plaintiff is further entitled to a specific performance of said contract for the further reason that there is no supply of gas anywhere that can be obtained by this plaintiff for the purpose of carrying on its business of manufacturing glass products. This plaintiff has endeavored to secure a supply of gas from the Poteau field. The persons in charge of that field, since the said defendant in this case acquired the Cazort gas, have declined to [*to*] furnish this plaintiff with any gas whatever. There is therefore no supply of gas anywhere in this community where this plaintiff can obtain gas to supply its needs, and to take the place of the gas agreed to be furnished by the said defendant and S. H. Hale. Said defendant well knew, when it attempted and did secure a complete monopoly of the gas, that this plaintiff would be helpless to get a supply of gas from any other source. Said defendant apparently gladly and willingly complied with the Hale contract from the time that it purchased the same, and took over all the Hale properties until after it had acquired the Cazort gas, and thus had secured a complete monopoly. Soon thereafter, said defendant notified this plaintiff in effect, that it would no longer fulfill the Hale contract, although said defendant had repeatedly agreed to and assented that it would fulfill the Hale contract, and by its [fol. 70] conduct had validated that contract; and made it good and valid, and had carried it out for a long period of time.

The plaintiff further alleges that the Twin City Pipe Line Company has failed three times, as above set forth,

to furnish the necessary pressure, and has failed to furnish the same pressure to the plaintiff as the said Twin City Pipe Line Company furnishes to other consumers similarly situated.

The plaintiff alleges that the Twin City Pipe Line Company, and the other defendants are knowingly and wilfully, and wrongfully failing to furnish the same pressure to the plaintiff that said defendants are furnishing to other gas consumers. The plaintiff is therefore, entitled to an injunction and enjoining and restraining the said Twin City Pipe Line Company from failing to furnish the plaintiff gas under the same pressure that it furnishes the same gas to other industrial consumers, situated at and near the plants of the plaintiff.

Premises considered, this plaintiff prays:

1. That this court issue a temporary restraining order against the defendants and each of them herein, compelling them to furnish gas to this plaintiff at the same pressure that they furnish it to the competitors of his plaintiff, until the further order of this court.

2. That upon a proper hearing, a preliminary injunction be made against the defendants, compelling them to furnish the gas as above set forth.

3. That at the final hearing herein, this plaintiff have judgment against the defendants herein, for all damages which have been caused to this plaintiff, by reason of the failure of the defendants to furnish gas, as required by their contract.

4. That this plaintiff have all other and further relief.

5. That the preliminary injunction at the final hearing herein to be made permanent.

6. That the plaintiff recover all its costs, and that it have all other and further relief to which it may be entitled in law and equity.

7. The plaintiff further prays the court to make a temporary restraining order, and issue a prelimihary injunction enjoining the Twin City Pipe Line Company, and the [fol. 71] other defendants from failing to furnish gas to the plaintiff with the same pressure as that by which gas is

furnished to other consumers, and for all other and further relief.

James B. McDonough, Attorney for the Harding Glass Company.

Duly sworn to by C. H. Harding. Jurat omitted in printing.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

No. 448. Equity

SEPARATE ANSWER OF TWIN CITY PIPE LINE COMPANY AND INDUSTRIAL OIL & GAS COMPANY—Filed December 17, 1925

Now come the Twin City Pipe Line Company and Industrial Oil and Gas Company, and each of them, and for their separate answer to the complaint herein, admit that Harding Glass Company is a corporation organized under the laws of West Virginia, with its prinicapl place of business in Arkansas, in the City of Fort Smith. Said defendants allege that the two factories of the Harding Glass Company, and each of them, which are mentioned in the complaint herein are located within the limits of the City of Fort Smith, and that said Harding Glass Company had no glass factories outside of the City of Fort Smith.

Each of said defendants deny that the Twin City Pipe Line Company and the Industrial Oil & Gas Company are substantially one and the same corporation; each of said defendants allege that they are each separate and distinct corporations organized under the laws of the State of Arkansas, and they allege that there are a large number of stockholders in the Industrial Oil & Gas Company, and always have been, who own no stock in the Twin City Pipe [fol. 72] Line Company, and they allege that said stockholders own, and have always owned a substantial amount of stock in the Industrial Oil & Gas Company, and they further allege that there is one stockholder in the Twin City Pipe Line Company who owns $19,000.00 of stock in

said company, and who is a director in said company who is not now, and never has been a stockholder in Industrial Oil & Gas Company. They each allege that the Industrial Oil & Gas Company is engaged solely in the production of natural gas. Each allege that Twin City Pipe Line Company is a public utility engaged in transporting gas through pipe lines, and in selling same in the city of Fort Smith under rates fixed in November, 1921, by the board of Commissioners of the City of Fort Smith, and in selling gas in the city of Van Buren under rates fixed in November, 1921, by the City Council of the city of Van Buren, and in selling gas outside of the cities of Fort Smith and Van Buren under the rates fixed and prescribed at various times by the Corporation Commission and the Railroad Commission of the State of Arkansas.

Defendants deny that it is impossible under present conditions to manufacture glass products without a good supply of natural gas.

Defendants deny that Twin City Pipe Line Company and Industrial Oil and Gas Company, together produce gas and sell it in the City of Fort Smith and elsewhere; they allege that the Industrial Oil & Gas Company alone produces gas and that it sells its entire production and such other gas as it is able to purchase from time to time to the Twin City Pipe Line Company. Each allege that Twin City Pipe Line Company is not engaged in the production of gas, and that it is engaged solely in the business of transporting gas purchased by it and in selling same as public utility in the city Fort Smith and elsewhere.

Defendants admit that on the 6th day of October, 1923, the plaintiff and S. H. Hale executed the contract which is set out at length in the complaint.

Defendants allege that in November, 1921, the City Commission of the City of Fort Smith Arkansas, after a hearing, by resolution, duly adopted, fixed the following schedule of rates to be charged by the Twin City Pipe Line Company and the Clear Creek Oil & Gas Company to industrial users of gas in the city of Fort Smith, to-wit:

For the first one million cubic feet of gas per month, 15c per thousand cubic feet,

[fol. 73] For the next one million cubic feet of gas per month, 1[illegible]c per thousand cubic feet,

For the next one million cubic feet of gas per month, 13c per thousand cubic feet,

For all over three million cubic feet of gas per month, 12c per thousand cubic feet,

That said rates have never been changed and are the rates at which the Twin City Pipe Line Company is required to and does furnish gas to industrial users in the city of Fort Smith. That at the time said rates were established the Clear Creek Oil & Gas Company was likewise a public utility and was engaged in producing gas in Crawford County, and in transporting and selling same as a public utility in the City of Fort Smith and elsewhere, and that it continued in such business a- a public utility down until November, 1923, when it sold all of its pipe lines to the defendant the Twin City Pipe Line Company.

Defendants deny that at the time that S. H. Hale executed said contract set forth at length in the complaint that he was the owner of gas wells but they admit that S. H. Hale a- that time said contract was entered into, did own one gas well in Crawford County, Arkansas, which had been drilled by him as lessee, and that as lessee he controlled a certain amount of acreage in Crawford County most of which has since proven to be non-productive.

Defendants further admit that S. H. Hale owned the majority of stock in the Clear Creek Oil & Gas Company, and was its president and manager, but they allege that Clear Creek Oil & Gas Company was a public utility and was obligated to sell gas in the city of Fort Smith at the rates fixed and prescribed by the City Commission of said city.

Defendants allege that during the year 1922, and the early part of 1923, the Twin City Pipe Line Company furnished gas to the plaintiff herein at its factory in the city of Fort Smith, and that said gas was furnished by Twin City Pipe Line Company to the plaintiff at the regular schedule of rates theretofore fixed by the City Commission of the city of Fort Smith. That the plaintiff attempted to get the Twin City Pipe Line Company to make a special rate to it, but was advised by the Twin City Pipe Line Company that it (Twin City Pipe Line Company) was a public utility and could not discriminate between its customers, [fol. 74] and was bound to furnish gas at rates fixed by the City Commission of the City of Fort Smith.

Defendants say that S. H. Hale as an individual never had a sufficient amount of gas to supply the amount of gas called for in the contract set up in the complaint, and that this fact was well known to the Harding Glass Company at the time said contract was entered into.

Defendants further say that S. H. Hale never, as an individual, owned a pipe line in the city of Fort Smith, Arkansas, and that this fact was well known to the Harding Glass Company at the time said contract with S. H. Hale was entered into.

Defendants, and each of them, have no knowledge or information sufficient upon which to form a belief as to whether S. H. Hale was engaged in business as a public utility at the time of the making of said contract, and they, therefore, deny that said S. H. Hale did not make said contract as a public utility, and deny that he agreed otherwise than as a public utility to furnish said gas. They allege the facts to be that said gas was to be transported to the Harding Glass Company thru the pipe lines of the Clear Creek Oil & Gas Company, which was a public utility corporation owned and controlled by said S. H. Hale, as alleged by the plaintiff, and that the schedule of rates for said Clear Creek Oil & Gas Company in the City of Fort Smith had been fixed by order of the City Commission of the city of Fort Smith, as hereinbefore alleged. Defendants say that each of these facts was known to the plaintiff herein.

Defendants deny that S. H. Hale furnished any gas to the Harding Glass Company under said contract, and deny that Harding Glass Company paid S. H. Hale ten cents for any gas furnishing under said contract.

Defendants deny that Harding Glass Company made any investments whatsoever relying upon the ability or responsibility of said S. H. Hale to furnish gas to the Harding Glass Company. Said defendants deny that the Harding Glass Company made investments altogether exceeding $200,000.00, or any other sum, relying upon said contract. Defendants deny that any investments were made by Harding Glass Company upon the faith that said contract was legal, or valid, or upon the faith of said contract, or upon the fact that said S. H. Hale would fully perform the same.

Defendants deny that after the Harding Glass Company had invested large sums of money in any plant, or at any

[fol. 75] other time, Twin City Pipe Line Company entered upon a plan to acquire a complete monopoly of all the gas in this territory. They deny that the Twin City Pipe Line Company is obligated to carry out fully and completely all the terms of the contract between S. H. Hale and Harding Glass Company.

Defendants deny that Twin City Pipe Line Company has confirmed and agreed to all the terms and conditions of said contract. Defendants deny that Twin City Pipe Line Company knew [the] had invested large sums of money upon the faith that the contract above set forth would be fully and completely carried out; deny that Twin City Pipe Line Company is obligated and bound to perform all the terms and conditions thereof. Defendants say that they have no knowledge or information sufficient upon which to form a belief as to whether or not after S. H. Hale and Harding Glass Company executed the contract described in the complaint, one G. T. Cazort at-empted to make a contract with the Harding Glass Company to furnish the Harding Glass Company gas at a less figure than that which was paid by Harding Glass Company to S. H. Hale. They deny that Harding Glass Company considered itself bound by the Hale contract; deny it declined to enter into any arrangement with G. T. Gazort to secure its gas from him. They deny that for the purpose of removing all competition in the production and sale of gas in this community, the Twin City Pipe Line Company or Industrial Oil & Gas Company or either of them, secured by contract with G. T. Gazort the supply of gas of said Cazort. They admit that the Industrial Oil & Gas Company has purchased from G. T. Gazort all of the gas supply of G. T. Cazort, and they admit that the Industrial Oil & Gas Company has secured from the Le Flore County Gas & Electric Company all of the surplus gas which it has to sell, and they admit and they allege that the Industrial Oil & Gas Company is selling gas purchased by it, and all gas which it can produce to the Twin City Pipe Line Company, and they allege that Industrial Oil & Gas Company entered into a contract for the purchase of gas from Le Flore County Gas & Electric Company because it realized that it did not have gas of its own at sufficient pressures to supply the needs of its customers on cold days and that it purchased said gas in order that it

might attempt to furnish to the Twin City Pipe Line Company all of the gas which Twin City Pipe Line Company would need in performing the latter's obligation as a public utility in furnishing gas to its customers at adequate pressures.

[fol. 76] Defendants deny that Twin City Pipe Line Company took the position that said contract between the Harding Glass Company and S. H. Hale was legal, valid or binding; deny that Harding Glass Company was expending large sums of money, relying upon said contract; deny that Twin City Pipe Line Company was advised of said fact.

Defendants deny that said contract is a legal, valid or binding contract between the plaintiff herein and Twin City Pipe Line Company.

Defendants deny that Twin City Pipe Line Company has changed its position, and deny that the change of position of the Twin City Pipe Line Company is due to its monopolistic control of the entire gas supply, and deny that the gas price has not been fixed by any regulatory body, and expressly allege, as heretofore set forth, that it is a public utility and that the price at which it may sell gas in the City of Fort Smith was fixed by order of the City Commission made in November, 1921, upon a sliding scale of 15¢ down to 12¢, as above set forth.

Defendants deny that the gas price between S. H. Hale and Harding Glass Company has not been fixed by any regulatory body, and deny that Twin City Pipe Line Company is therefore bound and obligated under said contract, to furnish gas under terms of said contract. Twin City Pipe Line Company denies that it is estopped to set up and claim that said contract is illegal or void, and expressly alleges that said contract is illegal and void, and was illegal and void at the time it was made, and denies that it stood by and encouraged Harding Glass Company to invest enormous sums of money, or that it knew that said sums of money were invested upon the faith that said contract would be carried out.

Defendants deny that Harding Glass Company has expended any money, relying upon the contract set forth in the complaint or that it has expended $5,000.00 upon its tanks, or $5,000.00 in heating the tanks and preparing the raw material for the making of glass.

Defendants deny that Harding Glass Company will lose $15,000.00 or any other sum, by reason of abandoning its present operation because of the disorganization of its business, or the breaking down of its organization. It says it has no knowledge or information sufficient upon which to form a belief as to whether or not the organization of the Harding Glass Company is efficient, and denies that if said Harding Glass Company is compelled to shut down its [fol. 77] plants, its loss by reason of the disorganization of its system will amount to $15,000.00, or any other sum.

Defendants deny that Harding Glass Company has business on its books amounting to $50,000.00 or that it has made any contracts for the sale of glass relying upon said contract. Denies that if said Harding Glass Company should shut down its plant its loss would be irreparable, and denies that it is seeking to charge to the Harding Glass Company any unreasonable or unjust price for gas, and allege that the question of the proper rate for gas furnished by the Twin City Pipe Line Company is not, and cannot become an issue in this case for the reason that the Twin City Pipe Line Company has instituted two suits at law in this court to recover from Harding Glass Company the amount due by the Harding Glass Company to Twin City Pipe Line Company for said gas furnished to Harding Glass Company, and that said suits are now pending in this court between Harding Glass Company and Twin City Pipe Line Company.

They deny that the Harding Glass Company will lose at least $3,000.00 on each of its furnaces, in addition to any other sum, and they deny that its loss on its future trade and business would be irreparable and unmeasuable by any rule for the establishment of damages. Denies that Harding Glass Company will be subjected to suits for breach of contract, or would have to respond in damages to the holders of the contracts with it for the delivery of manufactured glass.

Defendants deny that the gas supply of the Harding Glass Company will be cut off, and they allege that the question of the price of gas to be paid by Harding Glass Company has been submitted to the judicial determination of this court in suits heretofore brought by Twin City Pipe Line Company against Harding Glass Company and now

pending in this court. The defendant, Twin City Pipe Line Company, denies that it is furnishing gas to any persons at any price except those fixed by regulatory bodies having jurisdiction of the fixing of rates, and alleges that all gas being furnished by it is furnished by it as a public utility, and that its rates inside of the City of Fort Smith have been fixed for industrial users and have been fixed by the Board of Commissioners of the City of Fort Smith, and that all other gas which it is furnishing outside of the City of Fort Smith is being furnished at rates fixed by the City Council of the City of Van Buren, or by order of the Railroad Commission of the State of Arkansas.

[fol. 78] Defendants admit that Twin City Pipe Line Company is furnishing some gas to smelters at ten cents per thousand cubic feet, but they allege that said rates to smelters were fixed by orders of the Railroad Commission of the State of Arkansas, and are binding and obligatory upon the Twin City Pipe Line Company, and cannot be changed by Twin City Pipe Line Company, except upon the order of the Railroad Commission of the State of Arkansas, and they deny that there is any discrimination by the Twin City Pipe Line Company in charging or seeking to collect from Harding Glass Company rates heretofore fixed by the City Commission of the City of Fort Smith. And in this connection Twin City Pipe Line Company alleges that the smelters are an entirely different class of customer than the Harding Glass Company; that they take gas uniformly 365 days during the year and 24 hours during the day, and that these facts were taken into consideration by the Arkansas Railroad Commission in fixing the rates to be charged to smelters. That the Harding Glass Company is not a uniform taker of gas, but on the contrary its plants are shut down during the large portion of each year.

Defendants deny that Harding Glass Company has no complete remedy at law and alleges that the complete determination of the proper price to be paid by Harding Glass Company has been submitted to the judicial determination of this court in suits now pending in this court, in which Twin City Pipe Line Company is plaintiff and Harding Glass Company is defendant, that said suits were brought at law by the Twin City Pipe Line Company and that answers have been filed thereto by Harding Glass Company, and that said suits are now at issue.

Defendants expressly deny that Twin City Pipe Line Company has indicated that it might or would cut off the suply of gas of the Harding Glass Company, and on the contrary the defendants allege that Twin City Pipe Line Company advised the Harding Glass Company that it would be necessary to have the price to be paid for gas determined by judicial proceedings, and has advised Harding Glass Company that suits would be brought for the purpose of collecting the amount legally due from the Harding Glass Company to the Twin City Pipe Line Company under the legal established rates.

Defendants deny that if the supply of gas of the Harding Company should be cut off at any time while said Harding Glass Company is in operation it would lose more than [fol. 79] $50,000.00 or would lose any sum. Twin City Pipe Line Company denies that it is not entitled to cut off the supply of gas of the Harding Glass Company in case of refusal of the Harding Glass Company to pay its bills for gas supplied, but it alleges that Twin City Pipe Line Company has no disposition, nor does it intend to cut off the supply of gas of the Harding Glass Company, and it further alleges, as above set forth, that it has instituted suit in this court to collect the legal rates to which it is entitled from the Harding Glass Company, and the Harding Glass Company has answered that in said suits and has set up said alleged contract of S. H. Hale, and that the Twin City Pipe Line Company is now willing and has at all times been willing to abide by the judicial determination of the issue in said suits at law.

Defendants deny that Harding Glass Company is entitled to a specific performance of said contract. Defendants deny that the contract between S. H. Hale and Harding Glass Company is or was a valid contract, and denies that Harding Glass Company is entitled to a specific performance of said contract. Denies that Harding Glass Company cannot be compensated in damages by any judgment against S. H. Hale; denies that there is any disposition on the part of the Twin City Pipe Line Company to shut off the supply of gas of the Harding Glass Company. Defendants deny that Harding Glass Company will be compelled to close down its plants, or that irreparable injury will be done to Harding Glass Company if its plants are

closed down. Defendants deny that the Harding Glass Company cannot operate its plants at a profit at the price of gas now demanded by Twin City Pipe Line Company, and deny that said prices are wrongfully demanded by Twin City Pipe Line Company.

Twin City Pipe Line Company denies that said contract is binding on it and denies that it is attempting to break said contract or that defendants have made any arrangements to break said contract, and in this connection said defendants say that S. H. Hale at no time had sufficient gas individually with which to supply the requirements of said contract, and that sufficient gas could not be produced by any property owned by said S. H. Hale individually to comply with said contract, and that these facts were and are well known to the plaintiff in this law suit.

Defendants deny that Twin City Pipe Line Company has attempted to break any contract, or that it has assumed any contract.

[fol. 80] Defendants deny that there is any agreement between them and S. H. Hale to break said contract, deny that if said contract is broken Harding Glass Company will be compelled to shut down its plants and allege the facts to be that the Harding Glass Company knows that it can always obtain a supply of gas from the Twin City Pipe Line Company as a public utility so long as the Twin City Pipe Line Company has gas to furnish. It denies that the contract between S. H. Hale and Harding Glass Company was to be specifically performed in Sebastian County or Crawford County, and deny that any measure of damages which might be fixed in favor of Harding Glass Company against S. H. Hale would be wholly inadequate to compensate the Harding Glass Company for its losses in the event that said contract has been violated by S. H. Hale.

Defendants and each of them deny that there is an agreement between Twin City Pipe Line Company and S. H. Hale whereby it was understood between them, that the Twin City Pipe Line Company would endeavor to increase the price of gas; deny that the result of any suit brought by it at law would result in increasing the returns and compensation of S. H. Hale.

Defendants deny that Harding Glass Company has any lien by virtue of its contract with S. H. Hale upon any property formerly belonging to S. H. Hale, or that it is entitled to have a lien declared upon same, and deny that it is entitled to a decree of specific performance; deny that Harding Glass Company has, or is entitled to an equitable lien upon the leases of said S. H. Hale, in the hands of the Twin City Pipe Line Company, or that there are any assets that belong to S. H. Hale, and deny that the Harding Glass Company has an equitable interest in the debt or debts that are owing from the Twin City Pipe Line Company or Industrial Oil & Gas Company, or either of them, to S. H. Hale or his associates.

Defendants say that they have no knowledge or information on or upon which to form a belief as to whether Clarence R. Jones, Secretary of the Clear Creek Oil & Gas Company is in possession of the individual interests of S. H. Hale in Crawford County or Sebastian County, or as to whether or not Hale any longer has any interests, in either of said counties, and therefore denies each of said allegations.

Defendants deny that they, or either of them are attempting to violate any contract with Harding Glass Com- [fol. 81] pany; deny that Twin City Pipe Line Company has at this time a complete monopoly of all the gas in the City of Fort Smith and its environs. Defendants say they have no knowledge as to whether or not plaintiff can secure any supply of gas elsewhere, but they allege that the plaintiff, notwithstanding said alleged contract, has on many occasions in the past six months been endeavoring and attempting, and is still endeavoring and attempting to secure supply of gas for said glass factory.

Defendants deny that Twin City Pipe Line Company has wholly failed neglected or refused to furnish the plaintiff with gas at the pressure required under said contract; and denies that Twin City Pipe Line Company is bound by said contract, and Twin City Pipe Line Company alleges that at all times since Harding Glass Company recommenced taking gas from it that it has supplied Harding Glass Company with all the pressure that was available.

Defendants deny that on November 23rd, 1925, Twin City Pipe Line Company wholly failed, neglected or re-

fused to comply with its contract, or that it has any contract, and denies that it wholly failed to comply with its obligation to furnish gas at the pressure required by law, or required by said contract; denies that by reason of said failure to furnish said gas at such pressure said defendant will irreparably damage this plaintiff.

Defendants deny that on December 5th, 1925, or any other date, defendant again failed, neglected, or refused to furnish gas as provided in said contract, or refused to perform its obligation to this plaintiff to furnish gas, and they deny that such failure does any irreparable damage to this plaintiff; deny that plaintiff at all times has to have sufficient heat to keep the [g-ass] in a molten condition; deny that unless the glass is kept in said condition at all times the plaintiff cannot manufacture its glass; deny that it requires weeks to restore the molten glass to the proper condition for the manufacture of window glass or other products, and deny that failure to produce and furnish the quantity of gas to this plaintiff makes it impossible for plaintiff to conduct its business without irreparable injury or loss; deny that there has been any failure on their part to furnish gas or to furnish all the pressure that it could furnish, but they admit that after November 23rd plaintiff [fol. 82] complained that the pressure at all times was low, and admit that Twin City Pipe Line Company notified the Harding Glass Company that it was furnishing all the pressure it could furnish, and they allege that the Twin City Pipe Line Company on said days furnished gas at the highest pressure that it was able to furnish gas.

Defendants deny that there has been any discrimination against this plaintiff in furnishing gas to any of its competitors, or any other persons whatsoever; admit that the gas comes to Fort Smith, to all of the competitors of the plaintiff thru substantially the same lines. They allege the facts to be that on the day complained of all the gas wells from which the plaintiff obtains its supply of gas were being operated at their highest capacity, and that if there was any shortage of pressure at the plant of the Harding Glass Company it was due solely and entirely to the failure of the pressure of the wells from which the Twin City Pipe Line Company secures its supply to put more pressure in the pipe lines. Defendants say that they have no knowl-

edge or information sufficient upon which to form belief as to just what pressures are needed in the operation of the plaintiff's plant, but they allege that the plaintiff's plant could be improved so it would not require such pressure, and they further allege the facts to be that plaintiff's glass plants are located upon the pipe lines at points much farther removed from the gas fields than numerous other large takers of gas, including other glass plants in the city of Fort Smith, and they allege that if other glass plants, or other persons, have better pressure it was and is due solely to the closer proximity to the fields of these other takers of gas; deny specifically that there has been any character of discrimination with reference to furnishing pressure.

Defendants admit that the Twin City Pipe Line Company has an ample volume of gas, but they deny that Twin City Pipe Line Company has sufficient pressure to furnish all its customers during cold days in the winter months, and it alleges that on cold days in the winter months all gas supply which the Twin City Pipe Line Company has is being put into its pipe lines and is being furnished without discrimination to all of its customers.

Defendants deny that plaintiff has no adequate remedy at law and deny that it is entitled to have a mandatory injunction against the defendant, Twin City Pipe Line Com- [fol. 83] pany, commanding or compelling said defendant to furnish gas at any other pressure than it has been furnishing same, and in this connection defendants again say that gas is being furnished at the highest available pressure on cold days to all customers of the Twin City Pipe Line Company without favor or discrimination.

Defendants deny that unless this court grants temporary restraining order or preliminary injunction that the Twin City Pipe Line Company will wholly fail or neglect to furnish gas to the plaintiff; deny that plaintiff will be irreparably injured or damaged in enormous sums of money.

Defendants deny that plaintiff is entitled to a decree compelling said defendants specifically to perform the contract between S. H. Hale and the plaintiff, and deny it is entitled to a decree compelling said S. H. Hale specifically to perform said contract.

Defendants deny that Twin City Pipe Line Company duly carried out said contract between this plaintiff and

S. H. Hale until it had secured a complete monopoly of all the gas supplies in and around the vicinity of Fort Smith, and deny that Twin City Pipe Line Company purchased all the gas known as the Cazort gas, but it admits that Industrial Oil & Gas Company has purchased said gas and is supplying same to Twin City Pipe Line Company, and alleges that except for this purchase by Industrial Oil & Gas Company of said gas that the failure of pressure complained of by the plaintiff would have been more severe than it has been.

Defendants and each of them, deny that until said gas was purchased by the Industrial Oil & Gas Company it was in competition with said defendant, and deny that said Cazort gas, or any of same, has ever been furnished in the City of Fort Smith except such of same as has been purchased by the Industrial Oil & Gas Company. They deny that said Cazort gas was purchased for the purpose of securing a monopoly of all gas consumed in and around Fort Smith, but allege that said gas was purchased that it might fulfill its obligation if furnishing an adequate supply of gas and in order that said Twin City Pipe Line Company might fulfill its duty to all of its customers; they deny that said gas was secured in order to enable the Twin City Pipe Line Company to raise its rates, or to violate its contracts, or that there has been any irreparable injury or damage to the plaintiff by reason of said facts, and allege that the Twin City Pipe Line Company's rates are fixed by public [fol. 84] authority according to law, and that the gas secured from G. T. Cazort was secured for the sole purposes above set forth in this answer.

Defendants say that they have no information sufficient upon which to perform a belief that there is no supply of gas anywhere that can be obtained by this plaintiff to supply its needs and defendants allege that natural gas is not essential to the manufacture of glass, and that window glass is being manufactured at other points with other fuel than natural gas.

Defendants admit that plaintiff has endeavored to secure a supply of gas from the Poteau field, notwithstanding its allegation with reference to the binding effect of the contract made with Hale. Defendants deny that they have attempted to secure a complete monopoly of gas; deny that

they agreed to fulfill Hale's contract and deny that they have breached the Hale contract. Deny that any action of theirs validated said contract, and for further answer these defendants say that at no time did the gas wells or gas acreage purporting to belong to S. H. Hale have sufficient gas with which to furnish plaintiff the gas called for in said contract, and that this fact was well known and has at all times been well known to this plaintiff.

Wherefore, premises considered defendants pray that this answer be treated as a response to the motion for preliminary restraining order and to the preliminary injunction, and also as an answer to the bill of complaint filed herein, and upon final hearing plaintiff's bill be dismissed for want of equity.

Daily & Woods, Solicitors for Defendants.

Duly sworn to by W. R. Martin. Jurat omitted in printing.

[File endorsement omitted.]

[fol. 85] IN UNITED STATES DISTRICT COURT

No. 448. Equity

AMENDMENT TO COMPLAINT—Filed December 23, 1925

Comes the Harding Glass Company, and asks leave of the court to file a reply herein, and in reply states as follows:

The Twin City Pipe Line Company has a complete monopoly in the furnishing and distribution of gas in the city of Fort Smith, and its environs. The rate alleged to be in existence in the answer herein is a rate which is confiscatory, and is unreasonable, and is unjust to the plaintiff. Said rate is confiscatory because plaintiff entered into a large number of contracts to sell its glass products, the cost of which was determined by the rate in the contract. To permit the defendants to change that rate and to increase the rate to twelve cents, thirteen cents, fourteen cents, and fifteen cents, would take the property of the plaintiff herein in violation of Section One of the Four-

teenth Amendment to the Constitution of the United States and would give said property in the nature of an increased rate to the Twin City Pipe Line Company and its associate company.

The plaintiff, upon the representations of the Twin City Pipe Line Company and upon its conduct, invested the sums of money heretofore described in the complaint, upon the faith of the representations of the Twin City Pipe Line Company and its associate company. The plaintiff made its contracts, and sold its products upon the faith that the gas would be the price fixed in the contract. Plaintiff cannot comply with those contracts, if the gas is now to be at the rate of twelve cents to fifteen cents.

Plaintiff denies that S. H. Hale owned only one gas well at the time said contract was made, and alleges that the number of gas wells owned by said S. H. Hale is wholly immaterial.

Further replying, the plaintiff herein states that the combination and association and agreement, including all agreements and contracts between the Twin City Pipe Line Company, the Industrial Oil & Gas Company and other companies owning the source of gas supply in and around Fort Smith are contracts and agreements in restraint of trade, and are void, and in violation of the laws of the State of Arkansas.

The plaintiff denies that the Twin City Pipe Line Company or the Industrial Oil & Gas Company purchased the gas of G. T. Gazort for the purpose of securing a supply [fol. 86] of gas for the city of Fort Smith, and alleges that the said gas was purchased solely to secure a monopoly on the supply of gas to the end that the defendants might raise the price of gas as they saw proper.

The plaintiff denies that the Twin City Pipe Line Company or its associate, made a contract with the Le Flore County Gas & Electric Company, for the purpose of getting a supply of gas or an additional supply of gas for use in the city of Fort Smith, but alleges that said agreement between the defendants and Le Flore County Gas & Electric Company was made for the purpose of completing the monopoly of the defendants over the gas supply in the city of Fort Smith. The plaintiff alleges that there is some kind of an arrangement, the nature of which is to the plaintiff

unknown, by means whereof the Twin City Pipe Line Company purchased a certain quantity of gas from the Le Flore County Gas & Electric Company, and at the same time the latter company purchased from the Twin City Pipe Line Company a certain other quantity of gas.

Plaintiff alleges that this arrangement is made by the Twin City Pipe Line Company, so that contract can control the supply of glass in the city of Fort Smith. Plaintiff alleges that prior to the making of that agreement the Le Flore County Gas & Electric Company was willing to furnish gas to the Harding Glass Company at the rate of ten cents per thousand cubic feet, provided the Harding Glass Company would receive said gas at the boundary line between the States of Arkansas and Oklahoma.

Plaintiff further alleges that by some system of operation which amounts to discrimination and manipulation of valves and regulators, the distributing systems of the Twin City Pipe Line Company and the Fort Smith Light & Traction Company are so arranged that the plaintiff is the only industrial plant that suffers from a shortage of gas.

Plaintiff further alleges that the Twin City Pipe Line Company owns a large line immediately to the north of the plant of the Harding Glass Company, and that a connection could easily be made between that pipe line and the plant of the Harding Glass Company, to the end that the Harding Glass Company would receive and have ample pressure for its gas. The Twin City Pipe Line Company has failed to make such connection, although at one time there was a pipe from the plant of the Harding Glass Company extending to the line north of the plant of the Harding Glass [fol. 87] Company, and gas was furnished through that pipe to the Harding Glass Company. For some reason unknown to the Harding Glass Company, that pipe was removed. The removal of that pipe put it in the power of the Twin City Pipe Line Company, by so gauging and regulating the regulators and valves, that rank discrimination could be made, and such discrimination is made against the Harding Glass Company. The plaintiff alleges that it is entitled under the contract, to have pressure at its plant which is substantially equal to pressure of gas furnished other plants in the same neighborhood.

The plaintiff further alleges that while it seriously and strenuously contends that said contract is valid and bind-

ing, and in effect, still, if this court should hold that the contract is not in effect, in that event the duty exists upon the Twin City Pipe Line Company and the other defendants, to furnish gas to the plaintiff without discrimination, and with substantially the same pressure that said gas is furnished to the industrial plants in the same neighborhood. The plaintiff alleges that the Twin City Pipe Line Company has so constructed and arranged its regulators and valves, that the system of distribution is wholly inadequate, and is negligently constructed, resulting in giving satisfactory pressure to all industrial plants in that neighborhood, except to the plant of the Harding Glass Company. The Harding Glass Company alleges that if the court should hold that it was the duty of the Harding Glass Company to construct a pipe line from the line of the Twin City Pipe Line Company, which lies north of the Harding Glass Company plant, the said Harding Glass Company is ready and willing to meet the expense of constructing an additional pipe line from the pipe line of the Twin City Pipe Line Company, which lies on the north, or it is willing, if need be, to construct an additional pipe line from the pipe line of the Twin City Pipe Line Company, which lies on the south. The line which lies on the south is the old line of the Clear Creek Oil & Gas Company. The Harding Glass Company is ready and willing, if the court should hold that such duty is upon it, and it is willing to assume that duty, even if the court does not so hold, to bear the expense of constructing either of said lines to the plant of the Harding Glass Company.

The plaintiff alleges that the defendants never failed to furnish the proper pressure until the times named in the original complaint herein. Upon information and belief, the plaintiff alleges that the sole cause of the failure of [fol. 88] the defendants to furnish gas at proper pressure is due to the fact that the defendants have so constructed and arranged their pipe lines, regulators, valves, and have so operated their system that they can easily and almost without detection, reduce the pressure at plaintiff's plant while at the same time, pressure is good at all other plants in that neighborhod. Plaintiff alleges that it is the bounden duty of the defendants, if they are public utilities, to so construct and arrange their pipe line systems that there will be given to the plaintiff gas at substantially the same

pressure to that given to other plants in the immediate neighborhood.

The plaintiff alleges that under Ordinance No. 1151, the Clear Creek Oil & Gas Company and its successor, the Twin City Pipe Line Company, have the right and the power to construct a pipe line from the junction of Johnson Street and Main Street, connecting with the ten inch pipe line, and extending along Midland Boulevard to the plant of the Harding Glass Company. The ordinance named grants power to the Clear Creek Oil & Gas Company and its successors, to construct the pipe line along said Midland Boulevard. It is the duty of the Twin City Pipe Line Company, being the successor and owner of said ten inch pipe line, to connect the ten inch pipe line at the junction of Johnson Street and Main Street with another pipe line from that point to the plant of the Harding Glass Company. The plaintiff alleges that if that is done, there will be ample gas furnished to the Harding Glass Company. The plaintiff alleges that it is the duty of the Twin City Pipe Line Company to drill new wells under the contract heretofore referred to. The Twin City Pipe Line Company has not drilled any new wells since it acquired the Cazort gas. It is its public duty to drill said wells and to keep the supply of gas ample, as long as it is in the public utility business. The plaintiff believes that if new wells are drilled, and the pipe line constructed as above set forth, there will be ample pressure, and ample gas for the use of the Harding Glass Company, and it is only by constructing that line that there will be an absence of discrimination against the Harding Glass Company.

Premises considered, the plaintiff prays that the relief set forth in its original complaint be granted, and that it have judgment against the defendants in this action for all costs in this action laid out and expended, and that it be granted all relief in the original complaint herein prayed.

James B. McDonough, Attorney for Harding Glass Company.

[fol. 89] [File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

No. 448. Equity

SEPARATE AMENDMENT TO ANSWER OF TWIN CITY PIPE LINE Company and Industrial Oil & Gas Company, and Separate Answer of Twin City Pipe Line Company and Industrial Oil & Gas Company to Amendment to Complaint —Filed December 24, 1925

Now come the defendants, Twin City Pipe Line Company and Industrial Oil & Gas Company, and state to the court:

That the copy of the original complaint furnished to them by the plaintiff in this cause is not identical with the original complaint filed; that when they filed their original answer in said cause they were not aware of said discrepancy, and did not know there were certain allegations in the original complaint, and for that reason it is necessary for them to file an amendment to their answer. In addition thereto said defendants say that since the filing of their answer herein, the plaintiff has filed an amendment to its complaint, and that it is, therefore, necessary for these defendants to file an answer to said amendment to the complaint.

And now comes Twin City Pipe Line Company and Industrial Oil & Gas Company, and for separate amendment to their answer, deny that Twin City Pipe Line Company has failed three times, or any other number of times, to furnish the same pressure to the plaintiff that it furnished to other consumers similarly situated, and in this connection defendants allege that the Twin City Pipe Line Company has on all occasions furnished to the plaintiff all the pressure that was available.

Said defendants, and each of them, deny that they, or either of them, have either knowingly, or wilfully, or wrongfully failed to furnish the same pressure to the plaintiff that said defendants, or either of them, are furnishing to other gas consumers and they allege in this connection that Twin City Pipe Line Company has furnished to all of its customers, including plaintiff, all of the gas pressure that was available from all of its sources of supply, and that on all and each of said dates it has had on all the lines all

available sources of gas at the highest pressures that could be maintained, or which were available.

[fol. 90] Defendants deny that plaintiff is entitled to injunction against Twin City Pipe Line Company, and deny that it is entitled to an injunction against Twin City Pipe Line Company restraining said Twin City Pipe Line Company from failing to furnish the plaintiff with the same pressure that it furnished said gas to other industrial consumers situated at or near the plant of the plaintiff, and in this connection said defendants deny that there has been any discrimination against the plaintiff with reference to furnishing it pressures of gas.

And for amendment to their answer defendants say, that as alleged in the complaint herein S. H. Hale, owned and controlled — of the stock of the La Salle Oil & Gas Company and all of the stock of the Crowe Oil & Gas Company, as well as all of the stock of the Clear Creek Oil & Gas Company; that Crowe Oil & Gas Company was a producing company having producing wells in the gas fields in Crawford County; that the La Salle Oil & Gas Company owned the pipe lines from the wells of Crowe Oil & Gas Company to a point near Van Buren at which point it supplied gas to the Fort Smith Light & Traction Company, and perhaps others; that the Clear Creek Oil & Gas Company was a producing and pipe line company, with gas wells in Crawford County, and transported same thru pipe lines owned by it to the city of Fort Smith, where it sold same as a public utility under and by virtue of an indeterminate permit granted it by the Corporation Commission of the State of Arkansas.

Defendants further state that long prior to the date of the alleged contract between S. H. Hale and Harding Glass Company, to-wit: on the 19th day of July, 1923, the Fort Smith Light & Traction Company entered into a contract with La Salle Oil & Gas Company, by the terms of which the La Salle Oil & Gas Company, under rates to be fixed by the proper regulatory body, agreed to sell and deliver to the Fort Smith Light & Traction Company for a period of ten years the latter's requirements of gas, and to be sold by said Fort Smith Light & Traction Company to domestic consumers in the city of Fort Smith and elsewhere. That said contract recites that the La Salle Oil & Gas Company has entered into contracts for natural gas with the Clear Creek Oil & Gas Company and with the Crowe Oil & Gas

Company, and with S. H. Hale, and that said contracts are made a part of the contract between the La Salle Oil & Gas Company and Fort Smith Light & Traction Company, and that said contracts were made for the benefit of the Fort [fol. 91] Smith Light & Traction Company, and that it may have action thereon for any breach thereof. That said contract further recites and provides that the La Salle Oil & Gas Company has contracted with Crowe Oil & Gas Company and with Clear Creek Oil & Gas Company, and with S. H. Hale, whereby said parties have agreed to sell natural gas to the La Salle Oil & Gas Company, and that the La Salle Oil & Gas Company agrees to furnish to the Fort Smith Light & Traction Company all of the gas that is necessary to meet the requirements of the Fort Smith Light & Traction Company. That on the same date, to-wit: the 19th day of July, 1923, the La Salle Oil & Gas Company entered into a contract with S. H. Hale, in which last contract the contract between the Fort Smith Light & Traction Company and the La Salle Oil & Gas Company was set forth and referred to, and that by the terms of said last contract between La Salle Oil & Gas Company and S. H. Hale, said S. H. Hale agreed that for a period of ten years from the 19th day of July, 1923, he would furnish to the La Salle Oil & Gas Company such gas from his present and future wells in the vicinity of Fort Smith as La Salle Oil & Gas Company needs to supply the demand of its customer, the Fort Smith Light & Traction Company. That by the terms of said contract said S. H. Hale was authorized to sell only his surplus of gas over and above the requirements of the Fort Smith Light & Traction Company to such customers of gas, industrial or domestic, as he may desire to furnish. That a copy of said contract between La Salle Oil & Gas Company and S. H. Hale is attached hereto and made a part hereof.

Defendants allege that the contract between S. H. Hale and Harding Glass Company was entered into long after said contract; that at the time of the execution of said contract, and at the time of the execution of the Harding contract said S. H. Hale only had one gas well. Twin City Pipe Line Company says that all of said Fort Smith Light & Traction Company contracts have been assigned to it and that there is not now, and never has been sufficient gas produced from the leases standing in the name of S. H. Hale

to supply the requirements of the Fort Smith Light Traction Company, over and above the amount of gas which would be supplied by the wells owned by the Crowe Oil & Gas Company.

Defendants deny that S. H. Hale was not a public utility at the time of making all of said contracts, but they allege if any one is entitled to a preference as to gas produced from the wells and acreage formerly standing in the name [fol. 92] of the said S. H. Hale, said Fort Smith Light Traction Company is entitled to said preference under the terms of the contracts above set forth.

And for answer to the amendment to the complaint said defendants deny that the Twin City Pipe Line Company has a complete monopoly in the furnishing and distribution of gas in the city of Fort Smith, and deny that this allegation is material; deny that the rate alleged to be in existence in the answer is a rate which is confiscatory, or that same is unreasonable — deny that same is unjust to the plaintiff.

Defendants deny that said rate is confiscatory because plaintiff entered into a large number of contracts to sell its glass products, and deny that the cost of same was determined by the rate in said alleged contract. And defendants allege that the plaintiff well knew at the time that he entered into said contract that the rates at which gas could be sold and delivered to industrial consumers in the city of Fort Smith was subject to regulations by the Board of Commissioners of the City of Fort Smith, and that said rates had been established by said Board of Commissioners; deny that the defendants or either of them are attempting to change the rates or to increase the rates, but they allege that the rates at which the Twin City Pipe Line Company can sell gas to Industrial consumers in the city of Fort Smith was fixed in November, 1921, as hereinbefore alleged in the original answer, and they deny that the effect of requiring the plaintiff to pay said legal established rate would take its property in violation of Section One of the Fourteenth Amendment to the Constitution of the United States, or that same would give its property to the Twin City Pipe Line Company, or to the Industrial Oil & Gas Company or either of them.

Defendants deny that the plaintiff relying upon the representations of the Twin City Pipe Line Company, or upon

its conduct, invested any money whatsoever, deny that it invested any money upon the representations of the Twin City Pipe Line Company or the Industrial Oil & Gas Company; deny that the plaintiff made its contracts, or sold its products upon the faith that the gas price would be fixed by said contract, deny that plaintiff cannot comply with those contracts, if the gas is now to be at the rate of twelve cents to fifteen cents.

Defendants deny that there is any combination between the Twin City Pipe Line Company and Industrial Oil & Gas [fol. 93] Company; deny that the agreements and contracts between Industrial Oil & Gas Company and Twin City Pipe Line Company, or its contract with any other company owning a source of gas supply in and around Fort Smith are contracts or agreements in restraint of trade, or are void; deny that any of same are in violation of the laws of the State of Arkansas.

Defendants deny that the Industrial Oil & Gas Company purchased the gas of G. T. Cazort to secure a monopoly on the supply of gas, or to the end that they might raise the price of gas as they saw proper; deny that the agreement between the defendants, or either of them, was made for the purpose of completing a monopoly; deny that any arrangement has been made so that the Twin City Pipe Line Company could control the supply of gas in the city of Fort Smith.

Defendants say they have no knowledge or information sufficient upon which to form a belief as to whether prior to the making of the agreement the Le Flore County Gas & Electric Company was willing to furnish gas to the Harding Glass Company at the rate of ten cents per thousand cubic feet, and therefore deny same.

Defendants deny that by any system of operation the distributing systems of the Twin City Pipe Line Company, or the Fort Smith Light & Traction Company are so arranged that the plaintiff is the only Industrial plant that suffers from a shortage of gas, and deny that there has been any discrimination against this plaintiff; denies that there has been a manipulation of valves, lines or regulators, or either of same.

Defendants deny that Twin City Pipe Line Company owns a large line immediately to the north of the plant of

the Harding Glass Company, or that a connection could easily be made between that pipe line and the plant of the Harding Glass Company, to the end that the Harding Glass Company would receive and have ample pressure for its gas, and they allege that the only pipe line belonging to the Twin City Pipe Line Company lying north of the Harding Glass Company plant is located quite a distance from the plant of the Harding Glass Company, and that a connection thereto could only be constructed at a large expense; and Twin City Pipe Line Company alleges that it would not be able to supply gas thru said eight-inch line to the present persons connected therewith at adequate pressures and at the same time supply any gas thru the said line to the [fol. 94] Harding Glass Company, and if such connection was made to the said eight-inch line to the Harding Glass [—] that all of the present consumers on said eight-inch line would immediately have an inadequate supply of gas on cold days during the winter months.

Defendants allege that Harding Glass Company is now connected with a ten-inch line, being the line formerly owned by the Clear Creek Oil & Gas Company. They allege that said connection was made with said ten-inch pipe line on or prior to October 1923, and that at that time said Harding Glass Company ceased to take gas from the Twin City Pipe Line Company and notified the Twin City Pipe Line Company that it would no longer take gas from it, and that it was at that time, and for that reason that the connection formerly running to said eight-inch pipe line, then owned by the Twin City Pipe Line Company, to the Harding Glass Company plant was removed. Twin City Pipe Line Company alleges that it is positively untrue that Harding Glass Company does not know the reason why said connection with said eight-inch line was removed at that time, because the Harding Glass Company notified the Twin City Pipe Line Company it would no longer take the gas from it, or from said eight inch pipe line, and that said connection was removed at a time when Harding Glass Company voluntarily caused the present connection to be made to its plant with the ten-inch pipe line, from which it is now receiving gas. Twin City Pipe Line Company denies that there is any duty upon it to make said reconnection with the eight-inch pipe line, and alleges that to so do, and to

give Harding Glass Company connection with the eight-inch and the ten-inch pipe lines would operate as a discrimination against its other consumers and customers.

Defendants deny that the removal of the connection with the eight-inch pipe line put it in the power of the Twin City Pipe Line Company by so gauging or regulating the valves, and that rank discrimination could be made, and deny that such discrimination is made against the Harding Glass Company, and allege that these facts are not only untrue, but are known to be untrue by Harding Glass Company.

Defendants deny that under its contract it is entitled to have pressure at its plant which is substantially equal to pressure of gas furnished other plants in the same neighborhood; deny that there has been any discrimination against the plaintiff, and allege that plaintiff is taking its [fol. 95] gas from a ten-inch line, and that the pressures are being maintained in said ten-inch line at the highest pressure that these defendants are able to maintain same; that all of the high pressure wells from which the plaintiff secures its supply of gas are turned into said ten-inch line; that all of the gas which it received from the Poteau field is being turned into said ten-inch line and that gas is now being pumped into said ten-inch line thru its compressor station. That the valves from the ten-inch line to the Harding Glass Company is now and has at all times been wide open, and deny that there has ever been any manipulation of said valves, or any discrimination against this plaintiff, or any effort to control the supply of gas to this plaintiff and allege that any insufficiency of pressure, if any there has been, has been due solely to the failure in the pressure from the source of supply from which defendants secure their gas.

Defendants deny that Twin City Pipe Line Company has so constructed or arranged its regulators, or valves that the system of distribution is wholly inadequate; and deny that it is so constructed as to give satisfactory pressure to all industrial plants in the neighborhood, except to the plant of the Harding Glass Company; and defendants allege that any order requiring the Twin City Pipe Line Company to make any additional connection with Harding Glass Company, or permitting Harding Glass Company to

make any additional connections with Twin City Pipe Line Company would operate as a favor to the Harding Glass Company against other customers, and that the making of any such additional connections would have the immediate effect of rendering the supply of gas to other customers inadequate and insufficient.

Defendants deny that the whole cause of the failure of defendants to furnish pressure is due to the fact that said defendants have so constructed or arranged their pipe lines, regulators, valves, or they have so operated their system that they can easily or almost without detection reduce the pressure at plaintiff's plant, while at the same time, pressure is good at all other plants in that neighborhood; and they allege that their said allegation and said insinuations are wholly false and untrue.

Defendants deny that it is the duty of the defendants to so construct or arrange their pipe lines and there will be [fol. 96] given to the plaintiff gas at substantially the same pressure to that given to other plants in the immediate neighborhood.

Defendants deny that Ordinance No. 1151 is in effect, and they allege that said ordinance was surrendered by the Clear Creek Oil & Gas Company and the said company took out an indeterminate permit; deny that it is the duty of the Twin City Pipe Line Company to connect the ten-inch pipe line from the junction of Johnson Street and Main Street with another pipe line from that point to the plant of the Harding Glass Company; allege that gas could not be furnished at adequate pressures to the Fort Smith Light & Traction Company if this were done and allege that the laying of said pipe line would be a discrimination in favor of Harding Glass Company against other industrial consumers; deny that it is the duty of the Twin City Pipe Line Company to drill wells under the contract heretofore referred to. In answer to the allegation that Twin City Pipe Line Company has not drilled any new wells since it acquired the Cazort gas it alleges that it is not a producing company and never has been, and that it has never drilled wells, or that it has ever held itself out as a producing company.

Defendants deny however the drilling of any new wells in the present gas fields in Crawford County will have any

effect in increasing the pressures; deny that only by constructing that line that there will be an absence of discrimination against the Harding Glass Company.

And for further answer to the original complaint and to the amendment thereto these defendants, and each of them, say that plaintiff's bill of complaint and the amendment thereto, and each of same does not state sufficient facts to constitute a valid cause of action in equity against these defendants, or either of them.

Daily & Woods.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

No. 448. Equity

ANSWER OF THE FORT SMITH LIGHT & TRACTION COMPANY—Filed Dec. 24, 1925

The defendant, Fort Smith Light & Traction Company, in answer to so much of the amendment to the complaint as [fol. 97] prays for a new connection to be made between the plants of the plaintiff and the pipe lines of the Twin City Pipe Line Company, says:

That on July 19th, 1923, it entered into a contract with the LaSalle Oil & Gas Company, which said contract has been assigned to and is being performed by the Twin City Pipe Line Company to purchase from it all the gas which it required for its customers, except such as was being supplied under three contracts then existing, one of which has expired, another of which will expire in a few days, and the third contract with the Southwestern General Gas Company, which is now furnishing it all its output, which amount to approximately one million cubic feet per day.

That in order to obtain a fulfillment of said contract this defendant required the LaSalle Oil & Gas Company, which was a transportation company, to obtain and make part of its contracts underlying contracts with the Clear Creek Oil & Gas Company, which was both a producing and transportation company, and with the Crow Oil Company, a producing company, and with S. H. Hale individually, who

owned leases and had one producing well at said time, to furnish a supply of gas to the Clear Creek Oil & Gas Company to transport it in order to fulfill the entire requirements of this defendant.

That the said S. H. Hale owned a controlling interest in each of the companies referred to, as well as individually having leases and a producing well.

The purport of said underlying contracts was to provide a supply of gas for the La Salle Oil & Gas Company to deliver to this defendant all the natural gas it required, except such as was specifically excepted therein heretofore referred to.

That the underlying contract of S. H. Hale with the LaSalle Oil & Gas Company expressly stipulated that he would deliver to the LaSalle Oil & Gas Company for this defendant the entire output of all wells which he might drill upon his leases, and that he could only sell to any other customers the excess, if any, he would have from his wells over and above the requirements of this defendant.

That this defendant supplies all the domestic customers with natural gas in the Cities of Fort Smith and Van [fol. 98] Buren, and all commercial consumers therein, which are the business houses, office buildings, courthouse, schools, churches, and like consumers, and the inhabitants of said cities are dependent upon it for heating their homes, for their cooking, and for their comfort in the ordinanary conduct of their business affairs.

That said contract with the LaSalle Oil & Gas Company requires the delivery to this defendant at four stations in the City of Fort Smith the natural gas received by it in said city, at not less than 25 pounds pressure, and to the stations east of Van Buren, not less than 50 pound pressure; that such pressures are necessary for the proper service of this defendant to its consumers.

That to make the connection sought in the amendment to the complaint between the plaintiff's plants and the Twin City Pipe Line Company's line as prayed, would seriously impair the service which it is necessary for this defendant to render to its domestic and commercial customers and render their homes comfortable and the schools and business houses with sufficient heat. That should such connection be made in the present condition of the wells and pipe

lines of the Twin City Pipe Line Company, it would prevent the Twin City Pipe Line Company having 25 pounds pressure at its delivery points to this defendant in the City of Fort Smith, and prevent it having 50 pounds pressure at the delivery point beyond Van Buren, and without such pressure this defendant cannot render the service which it is its duty to render to its consumers.

This defendant alleges that the present situation is as follows: The Twin City Pipe Line Company has not been able to furnish 25 pounds pressure in the city of Fort Smith at times in the past ten days, and its pressure has been as low as six pounds for a short period, and ranging from 14 to 18 pounds during the peak load on the cold days in the last ten days.

That this defendant would have been wholly unable to supply its domestic and commercial consumers with gas, but for the fact that it took its powerhouse, which is a large consumer of gas, off gas as a fuel for its peak load and has been running for the past week with oil as a fuel which is more expensive than gas; and even with the power house off the line the defendant has not been able to furnish full and adequate service to all of its customers, and cannot do so under the present conditions of affairs should the weather become colder than it has been in the past ten days.

[fol. 99] This defendant alleges that realizing that the pressure from the gas field was declining, has in the last three years spent over $200,000.00 adjusting its distribution system so that it could furnish service to its customers under lower pressure than heretofore prevailing.

Defendant further alleges that unless it had so improved its distribution system to meet the declining pressure that the homes and business houses of the cities of Fort Smith and Van Buren would have in the last week been without an adequate supply of gas and the people would have been left cold and their lives and health in danger.

This defendant alleges that both by contract right and by virtue of its services to the domestic and commercial consumers of gas in the cities aforesaid, that it is entitled to receive gas from the Twin City Pipe Line Company in preference to a new connection sought to be made to serve the plants of the plaintiff, which new connection would

seriously interfere with its service to said domestic and commercial consumers.

Wherefore, this defendant prays that the relief prayed by the plaintiff, in so far as it seeks a new connection between its plants and the lines of the Twin City Pipe Line Company be denied, and for all other relief which defendant in equity and good conscience is entitled to receive in the premises.

Fort Smith Light and Traction Company, by Hill & Fitzhugh, Its Attorneys.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

No. 448. Equity

SEPARATE ANSWER OF S. H. HALE—Filed Dec. 31, 1925

Come now the above named defendant S. H. Hale, for his separate answer to the complaint herein admits that plaintiff and his co-defendants are corporations and that this defendant resides in Jackson County, Missouri. Said defendant alleges that the two factories of plaintiff are located within the city limits of Fort Smith and that plaintiff has no glass factory outside of said city.

Said defendant is without information on which to form a belief and therefore denies that it is impossible for plain- [fol. 100] tiff to manufacture its glass products without a good supply of natural gas. Said defendant admits that his co-defendants are public utility corporations but is without information upon which to form a belief and therefore denies that together, they produce and sell gas. Said defendant admits that on October 6, 1923, he and plaintiff executed the contract set forth in the petition of plaintiff, but he expressly denies that he is or was ever bound to furnish or supply plaintiff all the gas it required. On the contrary, said defendant alleges that at the time said contract was executed he owned the supply from only one well, known by plaintiff and himself to have a doubtful future, and that he only agreed as set forth in the terms of said contract, to furnish plaintiff such gas from his own supply

and from those of such others as he was able to obtain supply. Said defendant further alleges that to effectuate and make clear the understanding and purposes and undertakings of the parties to said contract it was plainly set forth that this defendant expected to obtain additional supply and expected to supply second party with gas secured from such expected sources, and said contract was further made expressly to provide that:

"6. First party (Hale) does not guarantee absolutely to furnish to second party the gas or amount of gas herein contracted for, beyond the extent that the wells of said S. H. Hale and the wells of other gas producers from which said first party may purchase gas will enable first party to do so."

Defendant further alleges that in the same behalf said contract was made further to provide:

'And it is agreed that first party (Hale) shall not be held responsible in damages or otherwise for any shortage or failure to furnish gas when the same is caused by the failure of his supply in the field from which he obtains the gas reasonably accessible to the main pipe lines which first party employs or hires for the transportation of gas for the service herein.'

Said defendant alleges that shortly after said contract was executed the said supply of gas controlled by him settled and became greatly diminished and that under the rights given him in said contract to assign same, under the full realization by plaintiff and himself that additional gas supply beyond the control of this defendant was necessary in order to supply plaintiff, he assigned and made over said contract with the full knowledge of plaintiff to a pub-
[fol. 101] lic utilities corporation; that plaintiff fully assented to said assignment and unreservedly ratified same and accepted said public utilities corporation as the substituted obligor thereunder and in said behalf thereafter transacted its said business with said substituted obligor, completely abandoning its relations with this defendant and all its contractual relations with him thereunder.

Said defendant further alleges that plaintiff by reason of the aforesaid facts and by its continued course of con-

duct has estopped itself from making any claim upon this defendant for specific performance, or otherwise, and that in equity and good conscience plaintiff has no claims upon this defendant and its rights, if any are solely against said substituted obligor.

Said defendant admits as by plaintiff alleged that he was connected with and largely in control of certain corporate interests then engaged as public utilities, and that plaintiff in making said agreement was circumventing its competitors and seeking to obtain a discriminatory, preferencial and illegal rate on said gas, which was a public com-odity, and he therefore denies that plaintiff made said contract entirely with him as an individual and not in part with a public utility, and said defendant denies that he was or is bound as an individual to furnish any specific amount of gas to plaintiff.

Said defendant denies that immediately upon the making of said contract he began furnishing to the Harding Glass Company all of its requirements for gas or that its requirements for its general factory purposes were paid for in the amount of ten cents per thousand cubic feet.

Defendant is without sufficient information upon which to form a belief and therefore denies that plaintiff relied upon the ability or responsibility of defendant to furnish gas for all its requirements or that plaintiff made heavy investments in the establishment of a mechanical gas plant or additions, or that it made investments exceeding $200,000.00, or that same were made upon the faith of said contract or upon his alleged obligations, or upon the alleged faith that said contract was legal or valid or binding or upon the alleged belief that he would fully perform the same.

Said defendant is without information upon which to form a belief and therefore denies that either of his co-defendants entered upon a plan to acquire a monopoly of gas in said territory or that they are obligated to carry out the terms and obligations of said contract or that they are [fol. 102] either of them ever confirmed or agreed to or carried out the terms and conditions of said contract or that they knew that plaintiff had invested large sums of money on the faith of said contract or at all, or that Cazort attempted to make a contract with plaintiff at any price or at all, or that plaintiff considered itself bound or declined

to enter into any agreement, or that his co-defendants or either of them secured the gas alleged from said Cazort or a monopoly of all the gas in said community, or that said contract between plaintiff and this defendant was legal or that his co-defendant never at any time questioned same. or that during said time plaintiff was expending large sums of money relying on said contract or that his co-defendant notified plaintiff that it had secured the obligations and terms of said contract or that it attempted to charge a different price for gas, or that said contract is binding between plaintiff and his co-defendants and this defendant or that his said substituted obligor and co-defendant is bound by all the terms and conditions of said contract, or that there is any change of position on his part, or that of his co-defendants' or that said alleged change is not due to price fixing by a regulatory body, or that the gas price between this defendant and plaintiff has not been fixed by any regulatory body, or that defendants are estopped to set up and claim that said contract is illegal and void or estopped for the alleged further reason that they stood by or encouraged plaintiff to invest money, or that they knew said sums were invested upon the faith of said contract, and deny that such was done.

Said defendant is without information on which to form a belief and therefore denies that plaintiff has expended for labor and other things upon each of its tanks $5,000.00 or a total of $10,000 in preparing raw material, or that to abandon its present operation would entail a loss of $15,000.00 or would disorganize its business or that it has business on its books amounting to $50,000.00 or that if compelled to shut down it would lose $3,000.00 on each of its furnaces or that its alleged losses would be irreparable or unmeasurable or that it would be subjected to suits for breach of contract or would have to respond in damages, or that plaintiff has no adequate remedy at law, but on the contrary said defendant alleges that there are now pending and at issue in this court actions at law between plaintiff and his co-defendants, the decision on which will be judicially and finally determinative of the price which plaintiff legally is required to pay for gas.

Defendant is without sufficient information on which to form a belief and denies that his co-defendant threatened [fol. 103] to shut off the supply of gas to plaintiff or that

it would lose $50,000.00 or that plaintiff is entitled to any specific performance or that there is any arrangement whereby his co-defendants are paying this defendant a certain price by month or year for property allegedly sold by this defendant or that same or anything done by them amounts to an effort to break said contract or that plaintiff would be compelled to close down its plant or that there is any arrangement between his co-defendants and this defendant endeavoring to increase the price of gas or that plaintiff is entitled to any equitable lien upon any assets of this defendant or has any interest in any thing due him or that said Clarence R. Jones is his agent or in charge of all the property of this defendant attempted to be described, or that this defendant and his co-defendants are attempting to violate said contract or that there is any monopoly of gas or that plaintiff cannot secure gas elsewhere or that there has been any failure to furnish plaintiff with all gas which reasonably could have been furnished plaintiff, or that plaintiff has ever made any complaint to this defendant or indicated otherwise than its intention to completely abandon its contract with this defendant, until the filing of this suit.

This defendant further alleges in November 1921 the city commission of Fort Smith after a hearing by resolution adopted and fixed the following schedule of rates to be charged by the Twin City Pipe Line Company and Clear Creek Oil & Gas Company and others engaged furnishing gas as a public commodity to industrial users of gas in said city, to-wit:

For the first one million cubic feet of gas per month 15c per thousand cubic feet.

For the next one million cubic feet of gas per month 14c per thousand cubic feet.

For the next one million cubic feet of gas per month 13c per thousand cubic feet.

For all over three million cubic feet of gas per month 12c per thousand cubic feet.

That said rates have ever since been and are in full force and effect and said corporate interests from which this defendant was to secure said gas in fulfillment of said contract were engaged at said times in producing and selling

gas to the public, all of which facts were to plaintiff well known.

[fol. 104] This defendant is without sufficient information on which to form a belief and therefore denies that there has been any discrimination against plaintiff, but alleges it to be a fact that plaintiff is geographically and from the standpoint of normal pressure differently situated from other users of gas and that if there has been any subnormal pressure at the plants of plaintiff same is accounted for thereby and by natural causes wholly beyond the control of these defendants, and therefore defendants deny that no reason exists why plaintiff should not have the same pressure of gas as others or that there has been any discrimination whatever against plaintiff.

This defendant denies that plaintiff is entitled to any specific performance of said contract or that plaintiff is entitled to any mandatory injunction or order or relief against this defendant.

Said defendant denies that any purchase of his interests was with the intention of creating a monopoly or to enable any raise of rates or to violate any contract or that such alleged action is to the injury or damage of plaintiff.

This defendant admits that plaintiff has endeavored to secure a supply of gas from the Poteau field and elsewhere and that it has thereby and by its entire course of conduct completely eliminated this defendant from any connection with said contract.

Wherefore, defendant S. H. Hale, having fully answered prays that the petition of plaintiff be dismissed; that said defendant go hence without day and that he recover of and from plaintiff his costs in this action expended.

A. C. Popham, Guy M. Cowgill, C. W. Knott, Counsel for Defendant S. H. Hale.

Duly sworn to by S. H. Hale. Jurat omitted in printing.

[fol. 105] [File endorsement omitted.]

IN UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF ARKANSAS, FORT SMITH DIVISION

No. 1192

TWIN CITY PIPE LINE COMPANY, Plaintiff,

vs.

HARDING GLASS COMPANY, Defendant

No. 1200

TWIN CITY PIPE LINE COMPANY, Plaintiff,

vs.

HARDING GLASS COMPANY, Defendant

No. 448. Equity.

HARDING GLASS COMPANY, Plaintiff,

vs.

TWIN CITY PIPE LINE COMPANY et al., Defendants

STIPULATION FOR TRANSFER OF CAUSES TO EQUITY DOCKET, ETC.—Filed February 15, 1926

It is hereby stipulated and agreed that the above causes No. 1192 and No. 1200 shall be transferred to equity and consolidated with case No. 448 Equity.

It is further agreed that the answers of the defendants as amended in 448 Equity, shall be deemed and treated as a reply to the answers and cross complaints filed in case No. 1192 and No. 1200.

It is further agreed that the evidence taken at the hearing on the interlocutory injunction in case No. 448 Equity, shall be transcribed by the court stenographer and filed and treated as a part of the evidence in said consolidated cause [fol. 106] on the final hearing which has been set for February 17th, 1926.

James B. McDonough, Attorney for Harding Glass Company. Daily & Woods, Attorneys for Twin City Pipe Line Company and Industrial Oil & Gas Company. A. C. Popham, Attorney for S. H. Hale.

[File endorsement omitted.]

In United States District Court

No. 448. Equity

Harding Glass Company, Plaintiff,

vs.

Twin City Pipe Line Company et al., Defendants

Order Consolidating Cases No. 1192, Law, and No. 1200, Law, with Case No. 448, Equity—February 15, 1926

This February 15, 1926, there is filed in this cause stipulation of the parties by their solicitors providing among other things that case No. 1192 Law, Twin City Pipe Line Company vs. Harding Glass Company, et al., and case No. 1200 Law, Twin City Pipe Line Company vs. Harding Glass Company, et al., be transferred to equity and consolidated with this case. And said cases being so transferred they are now consolidated with this case.

Frank A. Youmans, Judge.

In United States District Court

No. 448. Equity

Amendment to Answer of Twin City Pipe Line Company and Industrial Oil & Gas Company—Filed February 18, 1926

Now come said defendants and for amendment to their answer say:

That it is not true that Twin City Pipe Line Company is a common carrier; they say that the Twin City Pipe Line Company has never carried gas or transported same for any person or corporation. They allege that the only gas which has ever been transported thru its pipe lines is gas [fol. 107] which it had heretofore purchased. They deny that Twin City Pipe Line Company has ever held itself out as a common carrier and they allege that Twin City Pipe Line Company has never held itself out as a common carrier. They deny that Twin City Pipe Line Company has ever operated as a common carrier, and they allege that it has never operated as a common carrier. They deny that it has ever transported gas for Industrial Oil & Gas Company or for any person or corporation other than itself, and they further allege the facts to be that Industrial Oil & Gas

Company is a producing company and that it sells its entire production of gas and such other gas as it has contracted for to the Twin City Pipe Line Company alone and that Industrial Oil & Gas has no other customers.

Defendants further allege the facts to be that Twin City Pipe Line Company transports its own gas so purchased by it from the Industrial Oil & Gas Company from the well's mouth to the City of Fort Smith thru pipe lines owned and operated by said Twin City Pipe Line Company; that Twin City Pipe Line Company sells its own gas so transported by it to the industries in the City of Fort Smith, at rates fixed and established by the Board of Commissioners of the City of Fort Smith.

Daily & Woods, Attorneys for Defendants.

[File endorsement omitted.]

In United States District Court

No. 448. Equity

Harding Glass Company, Plaintiff,

vs.

Twin City Pipe Line Company, Industrial Oil & Gas Company, S. H. Hale, and Fort Smith Light & Traction Company, Defendants,

With Which has been Consolidated

Originally No. 1192

Twin City Pipe Line Company, Plaintiff,

vs.

Harding Glass Company, Defendant,

and

Originally No. 1200

Twin City Pipe Line Company

vs.

Harding Glass Company, Defendant

Decree—July 13, 1926

[fol. 108] Now on this 13th day of July, 1926, being one of the regular judicial days of the June term of this court,

this cause coming on for determination and decree on the evidence, arguments and briefs of counsel heretofore submitted; and the court being well and sufficiently advised in the premises finds:

The testimony does not warrant the injunctive relief prayed by the Harding Glass Company, nor is it sufficient to sustain the claim for damages of the Harding Glass Company against either the Twin City Pipe Line Company, the Industrial Oil & Gas Company or S. H. Hale.

The court further finds that the Twin City Pipe Line Company is entitled to judgment against the Harding Glass Company for the amount sued for on the purchase price of gas delivered to the Harding Glass Company by the Twin City Pipe Line Company, and the Harding Glass Company upon payment of that judgment is entitled to a judgment over against S. H. Hale and the Industrial Oil & Gas Company.

It is, therefore, considered, ordered, adjudged and decreed that the complaint of the Harding Glass Company be and the same is hereby dismissed on the merits for want of equity.

It is further considered, ordered, adjudged and decreed that the Twin City Pipe Line Company have and recover of and from the Harding Glass Company the sum of $17,155.46, for which let execution issue.

To each of which findings of fact, and to the decree of the court, the Harding Glass Company, at the time, save its separate and several exceptions.

If the Harding Glass Company shall pay the above judgment, it will be entitled to judgment, for the amount so paid by it, against S. H. Hale and the Industrial Oil & Gas Company. If S. H. Hale pays that judgment he will be entitled to a judgment for the amount so paid by him against the Industrial Oil & Gas Company. Jurisdiction of this cause is retained by this court for the purpose of entering the further judgments above indicated if and when the facts warrant.

It is further ordered, adjudged and considered that the right of the Harding Glass Company to recover judgment against S. H. Hale and the Industrial Oil & Gas Company, and each of them, is hereby made final. It is the intention of all parties hereto as herein set forth. This court retains jurisdiction of this cause solely for the purpose of entering

the judgment in favor of the Harding Glass Company [fol. 109] against S. H. Hale and the Industrial Oil & Gas Company upon payment by the Harding Glass Company of the judgment herein rendered in favor of Twin City Pipe Line Company, but does not retain jurisdiction for the purpose of determining the right of recovery of the Harding Glass Company against the Industrial Oil & Gas Company and S. H. Hale, that being adjudged final in this decree.

The court retains jurisdiction in the same way for the purpose of entering a judgment in favor of S. H. Hale against the Industrial Oil & Gas Company, if the said S. H. Hale should pay the judgment rendered against him.

To each of which findings, and to the order of the court retaining jurisdiction of this cause, and to the decree herein entered, and each of same, the Industrial Oil & Gas Company, and S. H. Hale, and each of them, separately save their separate and several exceptions.

Each party to this suit will pay his and its own costs.

Frank A. Youmans, Judge.

This judgment satisfied in full as to the Industrial Oil & Gas Co., and S. H. Hale, this 31st day of August, 1926.

Joseph R. Brown and James B. McDonough, Attorneys for Harding Glass Co., by Joseph R. Brown.

Attest: Wm. S. Wellshear, Clerk, by R. F. Salzman, Deputy Clerk.

This judgment as against Harding Glass Company is hereby satisfied in full this 31st day of August, 1926.

Daily & Woods, Attys. for Twin City Pipe Line Co., by Jno. P. Woods.

Attest: Wm. S. Wellshear, Clerk, by R. F. Salzman, Deputy Clerk.

MANDATE OF CIRCUIT COURT OF APPEALS SHOWING DISMISSAL OF APPEAL OF HARDING GLASS COMPANY—Filed in U. S. District Court Sept. 18, 1926

UNITED STATES OF AMERICA, ss:

(Seal of the United States Circuit Court of Appeals, Eighth Circuit.)

The President of the United States of America to the Honorable the Judges of the District Court of the United States for the Western District of Arkansas, Greeting:

Whereas, lately in the District Court of the United States for the Western District of Arkansas, before you, or some [fol. 110] of you in a cause between the Harding Glass Company, Plaintiff, and the Twin City Pipe Line Company, Industrial Oil & Gas Company, S. H. Hale and Fort Smith Light & Traction Company, Defendants, No. 448 in Equity, with which were consolidated the cases of Twin City Pipe Line Company, plaintiff, vs. Harding Glass Company, defendant, originally No. 1192, and Twin City Pipe Line Company, Plaintiff, vs. Harding Glass Company, defendant, originally No. 1200, wherein the decree of the said District Court was entered on the 13th day of July, 1926, as by the inspection of the transcript of the record of the said district court, which was brought into the United States Circuit Court of Appeals, Eighth Circuit, by virtue of an appeal of the Harding Glass Company, naming Twin City Pipe Line Company, Industrial Oil & Gas Company, S. H. Hale and Fort Smith Light & Traction Company, agreeably to the act of Congress, in such case made and provided, fully and at large appears;

And whereas, at the September term, in the year of our Lord one thousand nine hundred and twenty-six, the said cause came on to be heard before the said United States Circuit Court of Appeals, on the motion of appellants for an order dismissing the appeal herein, and counsel for appellees agreeing thereto, it is now here ordered, adjudged and decreed, by this court, that the appeal in this cause be, and the same is hereby, dismissed at appellants' costs; and that the Twin City Pipe Line Company, Industrial Oil & Gas Company, S. H. Hale and Fort Smith Light and Traction Company have and recover against the Harding Glass Company, the sum of Twenty-dollars for their costs herein and have execution therefor.

It is further ordered that the mandate of this court in this issue forthwith to the said District Court.

September 13, 1926.

You, therefore, are hereby commanded that such execution and proceedings be had in said cause, as according to

right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

Witness the Honorable William H. Taft, Chief Justice of the United States, the seventeenth day of September, in the year of our Lord one thousand nine hundred and twenty-six.

[fol. 111] Cost of Appellees: Attorney, $20.00—$20.00.

E. E. Koch, Clerk of the United States Circuit Court of Appeals, Eighth Circuit.

No. 448 Equity. United States Circuit Court of Appeals No. 7557 September Term, 1926, Harding Glass Company, Appellant, vs. Twin City Pipe Line Co. et al. Mandate. Filed Se. 18, 1926, Wm. S. Wellshear, Clerk.

MANDATE OF CIRCUIT COURT OF APPEALS SHOWING DISMISSAL OF APPEAL OF INDUSTRIAL OIL & GAS COMPANY AND S. H. HALE—Filed in U. S. District Court Sep. 18, 1926

UNITED STATES OF AMERICA, ss:

(Seal of the United States Circuit Court of Appeals, Eighth Circuit.)

The President of the United States of America to the Honorable Judges of the District Court of the United States for the Western District of Arkansas, Greeting:

Whereas, lately in the District Court of the United States for the Western District of Arkansas, before you, or some of you in a cause between the Harding Glass Company, Plaintiff, and the Twin City Pipe Line Company, Industrial Oil & Gas Company, S. H. Hale and Fort Smith Light & Traction Company, Defendants, No. 448 in Equity, with which were consolidated the cases of Twin City Pipe Line Company, plaintiff, vs. Harding Glass Company, defendant, originally No. 1192, and Twin City Pipe Line Company, Plaintiff, vs. Harding Glass Company, defendant, originally No. 1200, wherein the decree of the said District Court, which was brought into the United States Circuit Court of Appeals, Eighth Circuit, by virtue of an Appeal of the Industrial Oil & Gas Company and S. H. Hale,

naming Harding Glass Company, Twin City Pipe Line Company and Fort Smith Light & Traction Company, as appellees, agreeably to the act of Congress, in such case [fol. 112] made and provided, fully and at large appears;

And whereas, at the September term, in the year of our Lord one thousand nine hundred and twenty-six, the said cause came on to be heard before the said United States Circuit Court of Appeals, on the motion of appellants for an order dismissing the appeal herein, and counsel for appellees agreeing thereto, it is now hereto ordered, adjudged and decreed, by this court, that the appeal in this cause be, and the same is hereby, dismissed at appellants' costs; and the Harding Glass Company, Twin City Pipe Line Company and Fort Smith Light & Traction Company have and recover against the Industrial Oil & Gas Company and S. H. Hale, the sum of Twenty Dollars for their costs herein and have execution therefor.

It is further ordered that the mandate of this court in this issue forthwith to the said District Court.

September 13, 1926.

You, therefore, are hereby commanded that such execution and proceedings be had in said cause, as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

Whereas, the Honorable William H. Taft, Chief Justice of the United States, the Seventeenth day of September, in the year of our Lord one thousand nine hundred and twenty-six. Cost of Appellees:

Attorney, $20.00—$20.00.

E. E. Koch, Clerk of the United States Circuit Court of Appeals, Eighth Circuit.

No. 448 Equity. United States Circuit Court of Appeals No. 7556 September Term 1926. Industrial Oil & Gas Company, et al., Appellants vs. Harding Glass Company, et al. Mandate. Filed Sep. 18, 1926. Wm. S. Wellshear, Clerk.

[fol. 113] PLAINTIFF'S EXHIBIT 1 b

IN THE UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF ARKANSAS, FORT SMITH DIVISION

No. 448. Equity

HARDING GLASS COMPANY, Plaintiff,

vs.

TWIN CITY PIPE LINE CO., S. H. HALE, INDUSTRIAL OIL & GAS Company, and Fort Smith Light & Traction Company, Defendants.

Memorandum Opinion Upon Application of Plaintiff for Temporary Mandatory Injunction

All of the defendants have filed answers except S. H. Hale.

The original complaint contains the following allegations material to this application:

(a) The execution of a contract on October 6, 1923, between S. H. Hale and plaintiff by which the former agreed to sell to plaintiff natural gas for a period of five years at the rate of ten cents per thousand cubic feet to the extent of plaintiff's requirements for its glass plants, up to three million cubic feet per day.

(b) That this contract was assigned by Hale to the defendant Twin City Pipe Line Co. in November 1923, and that the latter assumed to perform the obligations of the contract.

(c) That gas under that said contract was furnished by the Twin City Pipe Line Company to plaintiff in sufficient quantities until November 23, 1925, but that since said date the supply has been inadequate.

(d) That the defendants Twin City Pipe Line Co. and the Industrial Oil & Gas Co. have secured control of practically all of the natural gas produced in the vicinity of Fort Smith.

The prayer of the complaint reads as follows:

"1. That this court issue a temporary restraining order against the defendants, and each of them, herein and com-

pelling them to furnish gas to this plaintiff at the same pressure that they furnish it to the competitors of this plaintiff, until the further orders of this court.

2. That upon a proper hearing a preliminary injunction be made against the defendants compelling them to furnish the gas as above set forth.

[fol. 114] 3. That at the final hearing this plaintiff have judgment against the defendants herein for all damages which have been caused to this plaintiff by reason of the failure of the defendants to furnish gas as required by their contract.

4. That this plaintiff have all other and further relief.

5. That the preliminary injunction at the final hearing herein be made permanent.

6. That the plaintiff recover all its costs and that it have all other and further relief to which it may be entitled in law and equity.

7. The plaintiff prays the court to make a temporary restraining order and issue a preliminary injunction enjoining the Twin City Pipe Line Company and the other defendants from failing to furnish gas to the plaintiff with the same pressure as that by which gas is furnished to other consumers, and for all other and further relief."

The Twin City Pipe Line Company and the Industrial Oil & Gas Company filed one separate answer. The answer alleges:

(a) That the Industrial Oil & Gas Co. is engaged solely in the production of natural gas and that the Twin City Pipe Line Co. is a public utility engaged in distributing gas through pipe lines and selling the same in the city of Fort Smith and city of Van Buren under rates fixed in November 1921 by the Board of Commissioners of the City of Fort Smith and by the City Council of Van Buren and in selling gas outside of the cities of Fort Smith and Van Buren under rates fixed and prescribed at various times by the Corporation Commission and Railroad Commission of the State of Arkansas.

(b) That in November 1921 the City Commission of Fort Smith fixed the following schedule of rates to be charged by Twin City Pipe Line Co., and the Clear Creek Oil & Gas Company to industrial users of gas in the City of Fort Smith: For the first million cubic feet of gas per month 15¢ per thousand cubic feet; for the next one million cubic feet of gas per month 14¢ per thousand cubic feet; for the next one million cubic feet of gas per month 13¢ per thousand cubic feet; for all over three million cubic feet of gas per month 12¢ per thousand cubic feet.

(c) That said rates have never been changed and are the rates at which the Twin City Pipe Line Co. is required to and does furnish gas to industrial users in the city of Fort Smith.

[fol. 115] (d) That at the time the contract between plaintiff and Hale was entered into he owned but one well in Crawford County, Arkansas.

(e) That said Hale never had a sufficient quantity of gas to supply the quantity called for by said contract.

(f) That the gas delivered under said contract was to be transported through pipe lines of the Clear Creek Oil & Gas Company, a corporation controlled by said Hale, and that the Clear Creek Oil & Gas Company was public utility.

(g) Said defendants Twin City Pipe Line Co. and Industrial Oil and Gas Co. deny that the Hale contract is a legal, valid or binding contract between the plaintiff and the Twin City Pipe Line Company.

From the allegations of the complaint and answer above summarized three questions are presented:

1. The extent to which the Twin City Pipe Line Co. assumed the terms of the contract between plaintiff and Hale.

2. The production of what wells was covered by the contract.

3. Whether the contract price was changed to the price fixed by the City Commission of Fort Smith.

A substantial controversy with regard to the contract is thus presented.

The plaintiff filed an amendment to its complaint which also contains denials of allegations in the answer of the Twin City Pipe Line Company and Industrial Oil & Gas Company.

With regard to the Hale contract the amendment contains the following:

"Plaintiff denies that S. H. Hale owned only one gas well at the time said contract was made, and alleges that the number of gas wells owned by said S. H. Hale is wholly immaterial."

The amendment also contains the following allegations:

"Plaintiff further alleges that by some system of operations which amounts to descrimination and manipulation of valves and regulators that the distributing system of the Twin City Pipe Line Co. and the Fort Smith Light & Traction Company are so arranged that the plaintiff is the only industrial plant that suffers from a shortage of gas.

[fol. 116] Plaintiff further alleges that the Twin City Pipe Line Company owns a large line immediately to the north of the plant of the Harding Glass Company and that a connection could easily be made between that pipe line and the plant of the Harding Glass Company and to the end that Harding Glass Company would receive and have ample pressure for its gas. The Twin City Pipe Line Company has failed to make such connection, although at one time there was a pipe from the plant of the Harding Glass Company extending to the line north of the plant of the Harding Glass Company, and gas was furnished through that pipe to the Harding Glass Company. For some reason unknown to the Harding Glass Company, that pipe was removed. The removal of that pipe put it in the power of the Twin City Pine Line Company, by so *guaging* and regulating the regulators and valves, that rank discrimination could be made, and such discrimination is made against the Harding Glass Company. The plaintiff alleges that it is entitled under the contract, to have pressure at its plant which is substantially equal to pressure of gas furnished other plants in the same neighborhood.

The plaintiff alleges that the Twin City Pipe Line Co. has so constructed and arranged its regulators and valves that the system of distribution is wholly inadequate, and

is negligently constructed, resulting in giving satisfactory pressure to all industrial plants in that neighborhood, except to the plant of the Harding Glass Company. The Harding Glass Company alleges that if the court should hold that it was the duty of the Harding Glass Company to construct a pipe line from the line of the Twin City Pipe Line Company, which lies north of the Harding Glass Company plant, the said Harding Company is ready and willing to meet the expense of constructing an additional pipe line from the pipe line of the Twin City Pipe Line Company, which lies on the north, or it is willing, if need be, to construct an additional pipe line from the pipe line of the Twin City Pipe Line Company, which lies on the south. The line which lies on the south is the old line of the Clear Creek Oil & Gas Company. The Harding Class Company is ready and willing, if the court should hold that such duty is upon it, and it is willing to assume that duty, even if the court does not so hold, to bear the expense of constructing either of said lines to the plant of the Harding Glass Company.

The plaintiff alleges that the defendants, never failed to furnish the proper pressure until the times named in the original complaint herein. Upon information and belief, [fol. 117] the plaintiff alleges that the sole cause of the failure of the defendants to furnish gas at proper pressure is due to the fact that the defendants have so constructed and arranged their pipe lines; regulators, valves and have so operated their system that they can easily and almost without detection reduce the pressure at plaintiff's plant while at the same time pressure is good at all other plants in the neighborhood. Plaintiff alleges that it is the bounden duty of the defendants, if they are public utilities, to so construct and arrange their pipe line systems that there will be given to the plaintiff gas at substantially the same pressure to that given to other plants in the immediate neighborhood.

The plaintiff alleges that under Ordinance No. 1151, the Clear Creek Oil & Gas Company and its successor, the Twin City Pipe Line Company, have the right and power to construct, a pipe line from the junction of Johnson Street and Main Street, connecting with the ten inch pipe line, and extending along Modland Boulevard to the plant of the Harding Glass Company. The ordinance named grants power to the Clear Creek Oil & Gas Company and its successors,

to construct the pipe line along said Midland Boulevard. It is the duty of the Twin City Pipe Line Company, being the successor and owner of said ten inch pipe line, to connect the ten inch pipe line at the junction of Johnson Street and Main Street with another pipe line from that joint to the plant of the Harding Glass Company. The plaintiff alleges that if that is done, there will be ample gas furnished to the Harding Glass Company. The plaintiff alleges that it is the duty of the Twin City Pipe Line Company to drill new wells under the contract heretofore referred to. The Twin City Pipe Line Company has not drilled any new wells since it acquired the Cazort Gas. It is its public duty to drill said wells, and to keep the supply of gas ample, as long as it is in the public utility business. The plaintiff believes that if new wells are drilled, and the pipe line constructed as above set forth, there will be ample pressure, and ample gas for the use of the Harding Glass Company, and it is only by constructing that line that there will be an absence of discrimination against the Harding Glass Company.

Premises considered, the plaintiff prays that the relief set forth in its original complaint be granted, and that it have judgment against the defendants in this action for all costs in this action laid out and expended and that it be granted all relief in the original complaint herein prayed." [fol. 118] The Twin City Pipe Line Company and the Industrial Oil & Gas Company have filed a separate amendment to their answer and separate answer to plaintiff's amendment in which a denial is made of all allegations in plaintiff's amendment.

In their amendment the Twin City and the Industrial say:

That S. H. Hale owned and controlled all of the stock of the LaSalle Oil & Gas Company and all of the stock of the Crow Oil & Gas Company; as well as all of the stock of the Clear Creek Oil & Gas Company; that the Crow Oil & Gas Company was a producing company having producing wells in the gas field in Crawford County; that the LaSalle Oil & Gas Company, owned the pipe lines from the wells of the Crow Oil & Gas Co., to a point near Van Buren at which point it supplied gas to the Fort Smith Light & Traction Company and perhaps others; that the Clear Creek Oil & Gas Company was a producing and transporting company

with gas wells in Crawford County and transported same through the pipe lines owned by it in the City of Fort Smith where it sold same as a public utility under and by virtue of an indeterminate permit granted it by the Corporation Commission of the State of Arkansas.

Defendants further state that long prior to the date of the alleged contract between S. H. Hale and Harding Glass Company, to-wit: on the 19th day of July, 1923, the Fort Smith Light & Traction Company entered into a contract with the LaSalle Oil & Gas Company, by the terms of which the LaSalle Oil & Gas Company under rates to be fixed by the proper regulatory body, agreed to sell and deliver to the Fort Smith Light & Traction Company for a period of ten years the latter's requirements of gas and to be sold by said Fort Smith Light & Traction Co., to domestic consumers in the City of Fort Smith and elsewhere; that said contract recites that the LaSalle Oil & Gas Company has entered into contracts for natural gas with the Clear Creek Oil & Gas Company, and with the Crow Oil & Gas Company, and with S. H. Hale, and that said contracts are made part of the contract between the LaSalle Oil & Gas Company and Fort Smith Light & Traction Company and that said contracts were made for the benefit of the Fort Smith Light and Traction Company and that it may have action thereon for any breach thereof. That said contract further recites and provides that the LaSalle Oil & Gas Company has contracted with the Crow Oil & Gas Company and with the Clear Creek Oil & Gas Company and with S. H. Hale [fol. 119] whereby said parties have agreed to sell natural gas to the LaSalle Oil & Gas Company and that the LaSalle Oil & Gas Co. agrees to furnish to the Fort Smith Light & Traction Company all of the gas that is necessary to meet the requirements of the Fort Smith Light & Traction Company. That on the same date, to-wit: the 19th day of July, 1923, the LaSalle Oil & Gas Company entered into a contract with the S. H. Hale in which last contract the contract between the Fort Smith Light & Traction Company and the LaSalle Oil & Gas Company was set forth and referred to, and that by the terms of said last contract between the LaSalle Oil & Gas Company and S. H. Hale, said S. H. Hale agreed that for a period of ten years from the 19th day of July, 1923, he would furnish to the LaSalle Oil & Gas Company such gas from his present and future wells in the

vicinity of Fort Smith as LaSalle Oil & Gas Company needs to supply the demands of its customer, the Fort Smith Light & Traction Company. That by the terms of said contract said S. H. Hale was authorized to sell only his surplus of gas over and above the requirements of the Fort Smith Light & Traction Company to such consumers of gas industrial or domestic, as he may desire to furnish."

Said defendants further allege:

"That the contract between S. H. Hale and Harding Glass Company was entered into long after said contract; that at the time of the execution of said contract and at the time of the execution of the Harding contract, said S. H. Hale only had one gas well. Twin City Pipe Line Company says that all of said Fort Smith Light & Traction Company contracts have been assigned to it and that there is not now and never has been sufficient gas produced from the leases standing in the name of S. H. Hale to supply the requirements of the Fort Smith Light & Traction Company over and above the amount of gas which would be supplied by the wells owned by the Crow Oil & Gas Company."

Upon its motion the Fort Smith Light & Traction Co. was made a party defendant in this suit and filed its answer in which it says:

"That on July 19th, 1923, it entered into a contract with the LaSalle Oil & Gas Co., which said contract has been assigned to and is being performed by the Twin City Pipe Line Company to purchase from it all the gas which it required for its customers, except such as was being supplied under three contracts then existing, one of which has been expired, another of which will expire in a few days, and the third contract with the Southwestern General Gas [fol. 120] Company, which is now furnishing it all its output, which amounts to approximately one million cubic feet per day.

That in order to obtain a fulfillment of said contract this defendant required the said LaSalle Oil & Gas Company, which was a transportation company, to obtain and make part of its contracts underlying contracts with the Clear Creek Oil & Gas Company, which was both a producing and transportation company, and with the Crow Oil Company,

a producing company, and with S. H. Hale, individually, who owned leases and had one producing well at said time, to furnish a supply of gas to the Clear Creek Oil & Gas Company to transport it in order to fulfill the entire requirements of this defendant.

That the said S. H. Hale owned a controlling interest in each of the companies referred to, as well as individually having leases and a producing well.

The purport of said underlying contracts was to provide a supply of gas for the LaSalle Oil & Gas Company to deliver to this defendant all the natural gas it required, except such as was specifically excepted therein heretofore referred to.

That the underlying contract of S. H. Hale with the LaSalle Oil & Gas Company expressly stipulated that he would deliver to the LaSalle Oil & Gas Company for this defendant the entire out-put of all wells which he might drill upon his leases, and that he could only sell to any other customers the excess, if any, he would have from his wells over and above the requirements of this defendant.

That this defendant supplies all the domestic customers with natural gas in the Cities of Fort Smith and Van Buren, and all commercial consumers therein, which are the business houses, office buildings, courthouse, schools, churches and like consumers, and the inhabitants of said cities are dependent upon it for heating their homes, for their cooking, and for their comfort in the ordinary conduct of their business affairs.

That said contract with the LaSalle Oil & Gas Company requires the delivery to this defendant at four stations in the City of Fort Smith the natural gas received by it in said city, at not less than 25 pounds pressure, and to the station east of Van Buren, not less than 50 pounds pressure; that such pressures are necessary for the proper service of this defendant to its consumers.

[fol. 121] That to make the connection sought in the amendment to the complaint between the plaintiff's plants and the Twin City Pipe Line as prayed, would seriously impair the service which it is necessary for this defendant to render to its domestic and commercial customers and render their home comfortable and the schools and business houses with sufficient heat.

That should such connection be made in the present condition of the wells and pipe lines of the Twin City Pipe Line Company, it would prevent the Twin City Pipe Line Company having 25 pounds pressure at its delivery points to this defendant in the City of Fort Smith, and prevent it having 50 pounds pressure at the delivery point beyond Van Buren, and without such pressure this defendant cannot render the service which it is its duty to render to its consumers.

This defendant alleges that the present situation is as follows: The Twin City Pipe Line Company has not been able to furnish 25 pounds pressure in the City of Fort Smith at times in the past ten days, and its pressure has been as low as six pounds for a short period, and ranging from 14 to 18 pounds during the peak load on the cold days in the last ten days.

That this defendant would have been wholly unable to supply its domestic and commercial consumers with gas, but for the fact that it took its powerhouse, which is a large consumer of gas, off gas as a fuel for its peak load, and has been running for the past week with oil as a fuel, which is more expensive than gas; and even with the power house off the line the defendant has not been able to furnish full and adequate service to all of its customers, and cannot do so under the present condition of affairs, should the weather become colder then it has been in the past ten days.

This defendant alleges that realizing that the pressure from the gas field was declining, has in the last three years spent over $200,000.00 adjusting its distribution system so that it could furnish service to its customers under lower pressure than heretofore prevailing.

Defendant further alleges that unless it has so improved its distribution system to meet the declining pressure, that the homes and business houses of the Cities of Fort Smith and Van Buren would have in the last week been without an adequate supply of gas and the people would have been left cold and their lives and health in danger.

[fol. 122] This defendant alleges that both by contract right and by virtue of its services to the domestic and commercial consumers of gas in the cities aforesaid, that it is entitled to receive gas from the Twin City Pipe Line Company in preference to a new connection sought to be made

to serve the plants of the plaintiff, which new connection would seriously interfere with its service to said domestic and commercial consumers.

Whereof, this defendant prays that the relief prayed by the plaintiff, insofar as it seeks a new connection between its plants and the lines of the Twin City Pipe Line Company be denied, and for all other relief which defendant in equity and good conscience is entitled to receive in the premises."

The contracts referred to in the answers of the Twin City Pipe Line Company and the Fort Smith Light & Traction Co. were introduced in evidence. The question is thus presented whether the contract made by Hale on the 19th of July, 1923 did not convey all of the gas he or his successors might control for the benefit of the Fort Smith Light & Traction Company to the extent of its requirements and to the exclusion of the Harding Glass Company until those requirements were fulfilled, under the contract with the Harding Glass Company of October 6, 1923.

The testimony does not sustain the allegation of the plaintiff that valves and regulators were manipulated by any of the defendants for the purpose of discriminating against the plaintiff.

The testimony shows that there is a controversy between the plaintiff and the Twin City Pipe Line Co. as to obligations assumed by the latter under the contract with Hale of October 6, 1923.

The testimony also [shaws] that the pipe line alleged in the amendment to plaintiff's complaint to have been taken up by the Twin City Pipe Line Company was taken up with full knowledge of the plaintiff and because the plaintiff gave notice to the Twin City Pipe Line Co. that he would no longer take gas through said pipe line from said Twin City Pipe Line Co.

The testimony also shows that upon cold days the pressure of gas is not sufficient to supply all of the users of gas their full requirements for a period beginning at 6 A. M. to 12 M. and some times in extreme cold weather into the afternoon of the same day.

[fol. 123] The testimony also shows that the Fort Smith Light & Traction Company through its distribution system, supplies all of the inhabitants of the cities of Fort Smith

and Van Buren with gas for domestic purposes, and all of the business houses, offices, churches, schools and hospitals for heating purposes.

The testimony also shows that the Harding Glass Company is situated upon a pipe line which is an extension of the pipe line thru which the Fort Smith Light & Traction Company takes gas at one of its four receiving points in Fort Smith and that all of the gas which the Harding plant obtains must pass the intake of the Fort Smith Light & Traction Co. at said point. That the gas is brought from the wells through a ten inch pipe and passes through an eight*h* inch pipe to the Fort Smith Light & Traction Company and that beyond the Traction Company the pipe is reduced in size to four inches until within a short distance of the Harding plant, when said pipe is increased to six inches.

Plaintiff admits in its complaint, and the testimony shows that such provision up to November 23, 1925, was sufficient to give to plaintiff all of the gas that it required. The testimony also shows that the Twin City Pipe Line Co. has put in a compressor for the purpose of increasing the pressure of gas to its consumers; that such compressor has been put in use within the last few days; that it consists of four units and that two units are in operation and that the other two [unit*es*] will be put in operation as soon as proper construction will admit.

Insofar as the plaintiff seeks a temporary mandatory injunction against the Twin City Pipe Line Co. based upon the contract between plaintiff and Hale, the prayer of the complaint cannot be granted.

1. Because it does not clearly appear that the Twin City Pipe Line Co. assumed the performance of the obligations of said contract.

2. It does not clearly appear that the Twin City Pipe Line Co. undertook in its contract of purchase from Hale to furnish plaintiff under said contract gas from wells other than those possessed by Hale at the time of the purchase by the Twin City Pipe Line Co.

3. That the contract made by Hale on July 19, 1923, for the benefit of the Fort Smith Light & Traction Co. conveyed all of the gas that he owned or controlled to the ex-

[fol. 124] tent of the requirements of the Fort Smith Light & Traction Co.

4. That the testimony shows that all of the gas produced from the wells of Hale and from the wells of the corporations controlled by Hale are not now sufficient to supply the requirements of the Fort Smith Light & Traction Co.

5. That the right of the plaintiff to the gas covered by plaintiff's contract with Hale is subordinate to the right of the Fort Smith Light & Traction Co. to the same gas.

For the purposes of this hearing the court assumes that contract between plaintiff and Hale of October 6, 1923, is legal and binding, and for the purposes of this hearing only, assumes that the Twin City Pipe Line Co. undertook to carry out that contract, but the court does hold that, that contract is subordinate to the contract of July 19, 1923, executed by Hale for the benefit of the Fort Smith Light and Traction Co. and that the contract between plaintiff and Hale was applicable only to so much of the gas arising from the wells covered by that contract as remained after the requirements of the Fort Smith Light & Traction Company were supplied.

As to the suggestion made in the amendment to the complaint with regard to the relief that would be afforded plaintiff if a connection be made between its plant and the line of the Twin City Pipe Line Co. to the north, it appears that that line now serves among other industrial consumers the municipal water plant, by which water is furnished to the inhabitants of Fort Smith and that by drawing off gas from that line for the benefit of the plaintiff, the capacity of the plant to furnish water to the inhabitants of Fort Smith may be jeopardized. Moreover, it appears from the complaint that such connection was once had and that by the action of the plaintiff in cancelling his arrangement with the Twin City Pipe Line Company to take gas from that source, the connection itself was taken out.

It is also suggested that if the four inch pipe line which now serves plaintiff's plant be increased to six inches, relief would be afforded to plaintiff. It appears that any additional gas which is thus secured by plaintiff must decrease the supply which would otherwise go to the Light

& Traction Company whose supply is already insufficient. It also appears that the schools of Fort Smith when in operation are heated with gas supplied by the Traction Company. Those schools are not now in session but will [fol. 125] on January 4th next. The re-opening of the schools on that date will call for a large additional supply of gas. The outstanding fact is that the present available supply of gas is not sufficient to meet the demand on cold days. The testimony does not support the allegations of the complaint that there is intentional discrimination on the part of the Twin City Pipe Line Co. If the supply were sufficient for all demands, the court would probably be warranted in making a mandatory order requiring such an adjustment as would afford the plaintiff relief, but under the situation in which the supply of gas is not equal to the demand on cold days, the court in undertaking to make an order would run the risk of adding to rather than diminishing the inconvenience which now exists.

The application for a preliminary mandatory injunction will therefore be denied.

Frank A. Youmans, Judge.

(Filed Jan. 2, 1926. Wm. S. Wellshear, Clerk.)

PLAINTIFF'S EXHIBIT 1c

Memorandum Opinion Upon Final Submission

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF ARKANSAS, PORT SMITH DIVISION

No. 488. Equity

HARDING GLASS COMPANY, Plaintiff,

vs.

TWIN CITY PIPE LINE COMPANY, S. H. HALE, INDUSTRIAL OIL and Gas Company, and Fort Smith Light & Traction Company, Defendants

The issues in this case were set out in memorandum opinion filed January 22, 1926. On the same day an order was

entered denying the application of plaintiff for a preliminary mandatory injunction.

The application for such injunction was submitted on the 30th of December, 1925. On that day the defendant S. H. Hale had not filed answer. He filed his answer on the 31st of December, 1925.

Testimony on final hearing was concluded February 20, 1926. The case was submitted upon oral argument May 31, 1926.

On the 6th of October defendant Hale entered into a contract with the Harding Glass Company "to supply all of [fol. 126] the requirements of gas for fuel of the two Harding Glass plants located at Fort Smith, Arkansas, at ten cents per thousand cubic feet for a period of five years from October 30, 1923."

The contract recited as follows:

"First party (Hale) secures his supply of gas from his own wells and those of any other individuals or companies with whom he has or may make contracts during the life of this contract from the Williams, Kibler and Alma gas fields, and also expects to obtain an additional supply from other gas fields from Crawford County, Arkansas, and vicinity and intends to supply the second party with gas secured from these three sources."

The contract also contained the following provision:

"First party does not guarantee absolutely to furnish to second party the gas or amount of gas herein contracted for, beyond the extent that the wells of said S. H. Hale and the wells of other gas producers from which first party may purchase gas will enable first party to do so."

The contract also contains the following provision:

"It is understood that no preference in the furnishing of gas is given to the second party by this contract, but that first party will, in the event of a shortage of gas sufficient to supply all his customers, pro rate the gas available as nearly as may be proportionately among his industrial consumers upon their written request according to the amount of their requirements."

The contract also contains the following provision:

"It is agreed that first party shall not be held responsible in damages or otherwise for any shortage or failure to furnish gas when the same is caused by the failure of his supply in the field from which he obtains the gas reasonably accessible to the main pipe lines which first party employs or hires for the transportation of gas for the service herein."

The contract also contains the following provision:

"Provided, however, that first party will at all times in good faith use his best efforts to procure said gas from the leases and holdings under his control, or from parties from whom he has or may make contract to buy gas to fulfill this contract in the field or fields within a reasonable distance from the trunk pipe lines used for transporting gas for this service."

[fol. 127] The contract also contains the following provision:

"This contract and all rights accruing thereunder may be assigned by either of the parties hereto. This contract and each and all of the provisions hereof shall extend to and be binding upon the heirs, successors, representatives and assigns of the parties hereto."

On the 13th of October, 1923, S. H. Hale, the Clear Creek Oil & Gas Company, the LaSalle Oil & Gas Company and the Crow Oil & Gas Company as parties of the first part, made a contract with the Twin City Pipe Line Company and the Industrial Oil & Gas Company as parties of the second part, by which the former agreed to sell and the latter agreed to buy the following described property, to-wit:

"All of the tangible, real and personal property of the Clear Creek Oil & Gas Company, the Crow Oil & Gas Company and the LaSalle Oil & Gas Company wheresoever located including all pipe lines owned by said corporations and the easements, contracts, liveness, privileges and franchises to lay and maintain said pipe lines under which said pipe lines are held and maintained along and upon the public highways, streets, alleys and bridges over, under and across the lands of others; also all gas and oil leases owned

or held by said companies; also all pipe and other materials on hand in transit or that have been heretofore ordered.

Also the Alma gas distributing plant; also all franchises held by said Clear Creek Oil and Gas Company, the Crow Oil & Gas Company and the LaSalle Oil & Gas Company by which either of said companies is given the right to sell or distribute gas in or to transport the gas through any city or town in Crawford County, Arkansas, or Sebastian County, Arkansas. * * *

All the gas and oil leases owned or held by S. H. Hale in Crawford and Sebastian Counties, Arkansas, and Sequoyah County, Oklahoma, also all franchises owned or held by said S. H. Hale in any town or city in Sebastian or Crawford Counties, Arkansas, and also all gas lines, gas wells, gas distributing systems and gas properties owned or controlled by said S. H. Hale in each of said three counties whether specifically mentioned herein or not, are to be conveyed to second parties as part of the consideration herein, which conveyance may be made either directly by said S. H. Hale to said second parties or by conveyance by said Hale to first parties or one of them and re-conveyance and assignment by such grantee to second parties."

[fol. 128] That contract contained the following provision:

"Parties of the second part agree to furnish to the Fort Smith Light & Traction Company the amount of gas accrued under the contract between the Fort Smith Light & Traction Company and the LaSalle Oil & Gas Company dated July 19, 1923, as of November 1, 1923, as well as all gas accruals thereunder thereafter."

By the same instrument the parties of the first part agreed to assign to parties of the second part, among others:

"Contract between the Fort Smith Light & Traction Company, party of the first part, and LaSalle Oil & Gas Company, party of the second part, dated July 19, 1923, including the supplemental contracts referred to therein."

"Contract between S. H. Hale and the Harding Glass Company dated October 6, 1923."

That contract also contains the following provision:

"Parties of the second part agree that they will carry out the legal obligations of the above specified contracts so

far as they are able to do so with the property which is to be conveyed to them by the terms of this contract, but they do not assume or agree to carry out said contract generally but only agree that the gas properties and pipe lines herein conveyed shall be operated in accordance with the legal obligations of said contract."

That contract also contained the following provision:

"It is further agreed that in the event the Harding Glass Company, or its assigns shall assert any claim against S. H. Hale for any alleged breach of the contract of October 6, 1923, between said Harding Glass Company and said Hale, then the amount finally adjudged to be paid for such breach shall be paid by said second parties, and they hereby agree to hold said Hale harmless from said judgment, and in the event of such suit being instituted said second parties shall have the right to appear and assert all the defenses that could have been asserted by said Hale, and conduct the litigation to its final termination, without interference by said Hale, the costs of such proceedings and defense to be paid by second parties."

That contract also contained the following provision:

"Parties of the second part shall have the right to designate that part of the property which shall be conveyed to [fol. 129] the Twin City Pipe Line Company, and that part of the property which shall be conveyed to the Industrial Oil & Gas Company."

Afterwards on the — day of ——, 1923, the Clear Creek Oil & Gas Company, LaSalle Oil & Gas Company, Crow Oil & Gas Company and S. H. Hale executed an assignment of twenty-four contracts to the Twin City Pipe Line Company. The first was described as follows:

"A certain contract dated the 19th day of July, 1923, between the Fort Smith Light & Traction Company, party of the first part, and the LaSalle Oil & Gas Company, party of the second part, including the supplemental contracts referred to therein, to-wit: A contract of even date between the Crow Oil & Gas Company, first party, and the LaSalle Oil & Gas Company, second party; also a contract of even

date between the LaSalle Oil & Gas Company, first party, and S. H. Hale, second party."

The fourth contract assigned in said assignment was described as follows:

"A certain contract dated October 6, 1923, between S. H. Hale, first party, and the Harding Glass Company, second party."

That assignment contained the following provision:

"This assignment is made and accepted pursuant and subject to the terms of a contract dated the 13th day of October, 1923, between the Clear Creek Oil & Gas Company, the Crow Oil & Gas Company, the LaSalle Oil & Gas Company, and S. H. Hale, parties of the first part, and Twin City Pipe Line Company, and the Industrial Oil & Gas Company, party of the second part, which said contract is made a part hereof as fully as if set out herein."

Under date of October 29, 1923, S. H. Hale wrote a letter to the Harding Glass Company, the first paragraph of which reads as follows:

"Beg to advise that I have recently negotiated a deal with the Twin City Pipe Line Company and Industrial Oil & Gas Co. whereby I have sold to them my gas holdings and those of the Clear Creek Oil & Gas Company, LaSalle Oil & Gas Company and Crow Oil & Gas Company in Crawford County, Arkansas. In the transaction they assume the contract and [fol. 130] obligations that I had relative to furnishing your company with gas, and owing to the fact that they own practically all of the holdings in that field and with their pipe line facilities, plus what they acquire from me and my companies, they are in a wonderful position to serve your company."

To that letter under date of October 31, 1923, the Harding Glass Company replied as follows:

"We have your favor of October 29th notifying us of your transfer of gas interests to the Twin City Pipe Line Company and Industrial Oil & Gas Company of this city and note that in the transaction they have assumed the contract

and obligations that exist under our contract of recent date with you for our supply of natural gas.

These things are but indicative of the evolution that transpires in business from time to time and which all men understand may come to pass of either side of his contract, or sometimes both sides of the contract. Since you have assured us that they have assumed the obligations of our contract with you in which we are to perform our part just the same as though you had retained the property, we see no reason why the contract should not be filled to the letter by either side.

Permit us to congratulate you on the handling of such a large field, in which we trust you have not suffered loss. Assuring you that in the short time with you your personality has been appreciated by us, and with best wishes for the future, we are,

Very truly yours, Harding Glass Company."

On the 19th day of July, 1923, a contract was entered into between the Fort Smith Light & Traction Company, as party of the first part, and the LaSalle Oil & Gas Company, as the party of the second part, for the purchase and sale of natural gas.

The contract contained the following recital:

"The party of the first part is engaged in the distribution of natural gas in the Cities of Fort Smith and Van Buren, Arkansas, and the party of the second part is a pipe line company purchasing gas and transporting same to the distribution system of the party of the first part, and selling same to the party of the first part, under certain contracts now existing."

[fol. 131] The contract also contained the following recital:

"The party of the second part has entered into contracts for natural gas with the Clear Creek Oil & Gas Company, with the Crow Oil & Gas Company and with S. H. Hale, copies of which contracts are attached hereto and made a part of this agreement, and the party of the first part may have action on said contracts made for its benefit, for any breach thereof, in-so-far as it affects this contract, to the same effect as the party of the second part may have."

The contract provided as follows:

"The party of the second part undertakes and agrees to deliver and sell according to the conditions of this agreement and the party of the first part agrees to receive and purchase for a period of ten years from this date all the natural gas that it requires, except as herein specifically provided, and not less than a minimum of four million cubic feet of natural gas daily, and one billion four hundred and sixty million cubic feet annually."

The rate to be paid for the gas was dependent on the quantity delivered and accepted, ten cents per thousand cubic feet up to a certain quantity and 12½ cents per thousand cubic feet in excess of that quantity.

The contract then contains the following recital:

"Said rates are the rates now established by the Railroad Commission and said rates shall continue to be the rates of this contract until the same are changed by the proper regulatory body having jurisdiction of the rates, and it is agreed that at any time either party may take up the question of rates with the proper regulatory body constituted by law."

The contract also contained the following provision:

"It is further agreed between the parties hereto that the party of the second part will supply gas under this contract so long as it is able to buy gas from the Crow Oil & Gas Company under the existing contracts which are attached to this contract and made a part thereof, or any renewals of the same, but in the event it is unable to secure gas under such contract then it is only obligated to supply such gas as it can secure from them under these contracts or renewals of the same, or any additional contract made in the future with other parties."

On the same date, to-wit: the 19th of July, 1923, S. H. Hale entered into a contract with the LaSalle Oil & Gas Com- [fol. 132] pany. The portion of said contract necessary to be considered in this connection reads as follows:

"This agreement made and entered into between the LaSalle Oil & Gas Company, party of the first part, and S. H. Hale party of the second part, withnesseth.

That, whereas, the party of the first part has this day entered into a contract with the Fort Smith Light & Traction Company to transport and deliver natural gas to the Fort Smith Light & Traction Company for a period of ten years from this date; and

Whereas, the party of the first part has entered into a contract with the Crow Oil & Gas Company whereby it agrees to purchase from the Crow Oil & Gas Company the latter's gas production to apply on said contract; and

Whereas, the party of the second part is desirous of selling to the party of the first part sufficient gas in excess of that purchased from the Crow Oil & Gas Company to enable the party of the first part to fulfill its contract with the Fort Smith Light & Traction Company;

It is therefore mutually agreed between the parties hereto that for a period of ten years from this date, the party of the second part agrees to and does hereby sell to the party of the first part, such gas from his present and future wells in the vicinity of Fort Smith, Arkansas, as the party of the first part needs to supply the demands of its customers, the Fort Smith Light & Traction Company, and the party of the first part agrees to purchase from the party of the second part all of the output of such wells as it is able to market to the Fort Smith Light & Traction Company under said contract, or to others over and above the amount received from the Crow Oil & Gas Company, provided, however, that the party of the second part shall have the right to supply any excess gas he may have over and above the requirements needed to supply the Fort Smith Light & Traction Company to such customers of gas, industrial or domestic, as may desire to purchase gas from him. Provided, however, the said S. H. Hale shall not unless compelled by legal authority, sell any gas directly or indirectly to a customer of the Fort Smith Light & Traction Company, or any domestic or commercial customer in Fort Smith or Van Buren, but party of the second part may sell to industrial or manufacturing customers in said cities."

[fol. 133] By that contract Hale reserved for sale to others only the gas he might have "over and above the requirements needed to supply the Fort Smith Light & Traction Company". By that contract also Hale's customers were limited in the cities of Fort Smith and Van Buren to industrial or manufacturing customers.

The Light & Traction Company on its own motion was made a party defendant in the suit of the Harding Glass Company against the Twin City Pipe Line Company, S. H. Hale and the Industrial Oil & Gas Company. The Fort Smith Light & Traction Company through its distribution system supplies the inhabitants of the City of Fort Smith and Van Buren with gas for domestic purposes and to all the business houses, offices, churches, schools and hospitals with gas for heating purposes. The consumers who take gas from the Fort Smith Light & Traction Co. number between nine and ten thousand.

During cold days in November and December, 1925, the pressure of gas was not sufficient to supply all the users of gas their full requirements for a period beginning at 6 A. M. to 12 M. and sometimes, during the coldest days, a portion of the afternoon.

After this suit was brought and before final submission, by the use of a compressor the Twin City Pipe Line Co. furnished sufficient pressure for the need of the Harding Glass Co.

The undertaking of Hale in his contact of October 6, 1923, with the Harding Glass Company with regard to the quantity of gas to be furnished was not greater than the obligation imposed by law upon a public utility furnishing gas to the public.

The contract expressly provided that Hale should not be held responsible for any failure to furnish gas when the same was caused by the failure of his supply. Whether the Twin City Pipe Line Company was bound by the Hale contract or not, the failure of gas was not shown to be attributable to any failure on its part to exercise reasonable diligence and judgment in the conduct of its business to the end that an ample supply might be afforded. Neither the terms of the Hale contract nor the assumption of that contract by the Twin City Pipe Line Co. nor the common law or statutory obligation upon the Twin City Pipe Line Co. imposed the duty upon it to insure to consumers at all [fol. 134] times an adequate supply of gas. The duty was imposed upon it to use reasonable diligence and care to afford such a supply. Up to the fall of 1925 it relied upon what is termed "rock pressure" to afford such supply. Its experience during the winter season of 1924 and 1925

lead its officers to believe that for the following winter season it would be necessary to put in a compressor. The complete installation of this compressor was not affected until about the first of January, 1926. It does not appear from the testimony that this delay was attributable to negligence on the part of the officers of the Twin City Pipe Line Company. The failure of the gas during the months of November and December, 1925 was such failure as was provided for in the Hale contract, and such failure as the law anticipates. The testimony does not warrant the injunctive relief prayed by the Harding Glass Company, nor it is sufficient to sustain the claim for damages of the Harding Glass Company against either of the Twin City Pipe Line Company, the Industrial Oil & Gas Company or S. H. Hale.

A suit was brought in the state court by the Twin City Pipe Line Co. against the Harding Glass Company for a balance alleged to be due for gas furnished by the former to the latter. The case was removed to this court on motion of the Harding Glass Company, as a Delaware corporation. It has filed an answer setting up the Hale contract and alleging an assignment of the same to, and assumption by the Twin City Pipe Line Company. On written stipulation signed and filed herein by all the parties including S. H. Hale, that case has been transferred to equity and consolidated with equity case No. 448, the one brought by the Harding Glass Company. The claim of the Twin City Pipe Line Co. is based upon rates fixed by the City of Fort Smith;

In November, 1921, said Commission fixed the following rates to be charged by the Twin City Pipe Line Co. to industrial users of gas in the City of Fort Smith;

"For the first one million cubic feet of gas per month 15 cents per thousand cubic feet.

For the next one million cubic feet of gas per month 14 cents per thousand cubic feet.

For the next one million cubic feet of gas per month 13 cents per thousand cubic feet.

For all over three million cubic feet of gas per month 12 cents per thousand cubic feet."

[fol. 135] It appears that the Harding Glass Company had paid to the Twin City Pipe Line Co. for gas consumed

by it at the rate of ten cents per thousand cubic feet, in accordance with the terms of the Hale contract, and denied further liability therefor. The relationship of the parties and their respective legal liabilities must be considered.

Section 17 of Act 124 of the Acts of the General Assembly of Arkansas for 1921 at page 199 contains the following provision:

"The jurisdiction of the municipal council or City Commission or any municipality shall extend to and include all matters pertaining to the regulation and operation within the limits of any such municipality of any street railroad, telephone company, gas company furnishing gas for domestic or industrial purposes, pipe line companies for transportation, distribution or sale of oil, gas, water, electric company, water company, hydro-electric company or other company operating a public utility or furnishing public service within such municipality.

Every person, firm, company or corporation engaged in any such public service business within any municipality shall establish, make and maintain such adequate and suitable facilities, appliances, devices, connections, installations and improvements in said municipality as may be essential to enable such public utility to properly perform its public utility duties within said municipality, so far as may be required by its franchise or contract, or so far as it is within the police power of this state or said municipality to require such service; and the municipal councils or city commissions of municipalities within the State of Arkansas regardless of class, shall have the exclusive right, and it is hereby made their duty from time to time to make all reasonable and proper rules and regulations with reference to the operation within such municipality of any such utility, and to order the performance of any duty devolving upon such public utility under its franchise or contract, if any, or under this or any other statute or law and from time to time to initiate, fix, promulgate, regulate, modify, amend, adjust, readjust or otherwise make and determine fair and reasonable rates to be charged by all public utilities for furnishing public utility service within such municipalities, which rates shall be so determined and fixed by an order or ordinance after hearing made either upon its

own initiative, or upon application of any such utility to such municipal council or city commission."

[fol. 136] In fixing the rates above stated, the city commission of the City of Fort Smith acted under the authority of the provisions of act No. 124 of the General Assembly of Arkansas above quoted.

At the time of Twin City Pipe Line Co. entered into the contract with Hale on October 6, 1923, it was a public utility and was included within the provisions of Section 4 of said act which section provides as follows:

"Every person, firm or corporation engaged in public service business in this state shall establish and maintain adequate and suitable facilities, safety appliances or other suitable devices and shall perform such service with respect thereto as shall be reasonably safe and sufficient for the security and convenience of the public and the safety and comfort of its employees and in all respects just and fair, and without any injustice, discrimination or preference. All charges, tolls, fairs and rates shall be just and reasonable and no change shall be made in any tariffs, rates, fairs, tolls, schedules or classifications except as in this Act herein provided."

The Twin City Pipe Line Company as a public utility and subject to the provisions of the act above quoted, could not make a contract which would bind it contrary to the provisions of said act Clear Creek Oil & Gas Co. vs. Ft. Smith Spelter Co., 148 Ark. 260; Ft. Smith Spelter Co. vs. Clear Creek Oil & Gas Co., 267 U. S. 231; Union Dry Goods Co. vs. Georgia Public Service Corporation, 248 U. S. 372.

It remains to be determined whether S. H. Hale at the time he entered into the contract with the Harding Glass Company of October 6, 1923, and the Industrial Oil & Gas Co., at the time it together with the Twin City Pipe Line Co. entered into the contract with Hale of October 12, 1923, were public utilities as defined in Section 4 above quoted of the Act of 1921, of the General Assembly of Arkansas.

In the case decided by the Supreme Court of Arkansas of Clear Creek Oil & Gas Co. against Ft. Smith Spelter Company, supra, it was said:

"The real point of the controversy between the parties is whether the contracts between appellant and appellees for

the sale and purchase of gas were executed by appellant when it was not acting in any public capacity, as contended by appellee, or whether appellant was from the start a public service corporation and the contracts attempted to [fol. 137] confer preferential rights to appellees as consumers. Learned counsel for appellees candidly concede that, if appellant was organized as a public service corporation and at the time of the execution of these contracts it was operating as such public utility in the production and distribution of gas, the contracts were void, so far as they undertook to confer special prices of gas is subject to control by the Corporation Commission, even though the statute authorizing such regulations was not passed until after the contracts were executed."

Further in the same opinion on page 268 of the volume above cited, the Supreme Court of Arkansas said:

"If appellant was not a public utility at the time these contracts with appellees were entered into and the contracts were not entered into in anticipation of appellant becoming such a public utility, but were merely private undertakings concerning a subject-matter over which the state had no control, then such contracts were valid, and the obligations thereof could not be impaired by any state regulation. Neither could appellant impair the obligations of its own contract valid at the time of its execution by subsequently engaging in the operation of business subject to the state's control. To permit that would be to allow the impairment of the contract by indirection, which could not be directly done."

The testimony does not show that S. H. Hale on the 6th day of October, 1923, was a public utility within the terms of Section 4 of the act above quoted. It does not appear that he owned the pipe line by which the gas he proposed to sell to the Harding Glass Company could be delivered. He had already on the 19th day of July, 1923 entered into a contract with the LaSalle Oil & Gas Co. by which he had sold to them all the gas that he had, or would subsequently acquire, to enable the LaSalle Oil & Gas Co. to carry out its contract on that date entered into with the Fort Smith Light & Traction Co. He had reserved the right in that contract to sell what gas he had remaining after the needs

of the Fort Smith Light & Traction Co. had been supplied. Under the decision of the Supreme Court of Arkansas above quoted, S. H. Hale was not at the time a public utility, nor does the testimony warrant the conclusion that he at that time intended to become a public utility. Therefore, there was no legal impediment to prevent him from making the contract with the Harding Glass Company. The price fixed in that contract for gas was unconditional.

Nor does it appear from the testimony that at the time. the Industrial Oil & Gas Company on the 12th day of Oc-
[fol. 138] tober, 1923 when it made the contract with Hale, was a public utility. It was and is a producing company only. It sells all the gas it produces to the Twin City Pipe Line Co. There was and is no legal impediment to prevent it from making the contract of October 12, 1923 with S. H. Hale.

By taking gas from the Twin City Pipe Line Company the Harding Glass Company was not estopped from holding Hale for a failure on the part of the Twin City Pipe Line Company to sell gas to the Harding Glass Company at a greater price than ten cents for one thousand cubic feet.

The result is that the Twin City Pipe Line Co. by virtue of the Statute of the Legislature of the State of Arkansas, above referred to, is entitled to judgment against the Harding Glass Company for the amount sued for on the purchase price of gas delivered to it by the Twin City Pipe Line Company. Upon the payment of that judgment by the Harding Glass Company, it will be entitled to judgment for the amount so paid by it against Hale and the Industrial Oil & Gas Company. If Hale pays that judgment he will be entitled to a judgment for the amount so paid by him, against the Industrial Oil & Gas Company under the contract of October 12, 1923, between Hale on the one side, and the Industrial Oil & Gas Company and the Twin City Pipe Line Company on the other.

Each party to this suit will pay his and its own costs. Jurisdiction of this case will be retained by this Court for the purpose of rendering the further judgments above indicated if and when the facts warrant.

Decree in accordance with this opinion may be submitted.

Frank A. Youmans, Judge.

(Filed June 10, 1926. Wm. S. Wellshear, Clerk.)

A. G. WILLIAMS, JR., being duly sworn, testified as follows:

Reside in Fort Smith. Am Secretary and General Manager of plaintiffs. Have held that position since June 1, 1927. On August 30, 1926, was General Superintendent of the Twin City Pipe Line Company and the Industrial Oil and Gas Company. Was present at the time of the signing of the contract in controversy. Have compared the original contract with the copy of same set out in defendant's an- [fol. 139] swer (201). The contract set out in defendant's answer is correct, with the exception that the word "of" is used instead of "or".

Said contract is as follows:

"PLAINTIFFS' EXHIBIT 1

In consideration of the undertakings and agreements hereinafter set out to be done and performed by the Twin City Pipe Line Company and Industrial Oil & Gas Company and the Harding Glass Company, it is mutually agreed as follows:

(1) All judgments and decrees now entered for or against either of them, or S. H. Hale, are to be satisfied and cancelled, and all former contracts between S. H. Hale and the Harding Glass Company, and between the Industrial Oil & Gas Company and the Harding Glass Company, and between the Twin City Pipe Line Company and the Harding Glass Company, are hereby abrogated as of September 1, 1926.

(2) All suits and appeals now pending between either of the parties hereto, or S. H. Hale, are to be dismissed and each party thereto is to pay its own costs, all questions involved in said suits having been adjusted and settled.

(3) The Twin City Pipe Line Company agrees to lay at once an 8" pipe line from a connection with its 10" line at or near what is known as 'The Carbarn' to a connection with its 8" line on Sixth Street near its regulator station, said 8" line to run by the meter station where the gas furnished the Harding Glass Company is measured, and to be connected at said meter station with the lines furnishing the Harding Glass Company with gas.

(4) The Harding Glass Company agrees to take all its requirements of gas for its plants in the City of Ft. Smith, Arkansas, from the Twin City Pipe Line Company so long as the Twin City Pipe Line Company can adequately supply its requirements and to pay for all gas furnished it hereunder, beginning September 1, 1926, at the regular sliding schedule of rates of twelve cents to fifteen cents, which is the rate now in effect for industries in the City of Fort Smith, Arkansas, or at such rate as may hereafter be fixed for industries in the City of Fort Smith by the proper regulatory body or Court having jurisdiction. All gas consumed by the Harding Glass Company up to September 1, 1926, shall be paid for at the rate of ten cents per thousand cubic feet.

[fol. 140] (5) The Harding Glass Company agrees that in the event there is a shortage of gas to that there is not enough to adequately supply the domestic consumer, that the Twin City Pipe Line Company may discontinue serving it gas, upon condition that the same character of service be given the Harding Glass Company that is given other industries in the City of Fort Smith, Arkansas, and that his gas service be not discontinued unless that of other like industries is discontinued also.

Witness our hands this 30th day of August, 1926.

Harding Glass Company, by (S.) C. H. Harding, President. Industrial Oil & Gas Co., by (S.) W. R. Martin, President. Twin City Pipe Line Co., by (S.) W. R. Martin, President.

I consent to the above.

(S.) S. H. Hale."

There were no suits pending at the time of the making of said contract between any of the parties or any appeals pending between any of the parties except the suits and appeals in the consolidated case No. 441 Equity.

(Objected to. Evidence admitted subject to objection.)

The Twin City Pipe Line Company and the Industrial Oil and Gas Company paid their own costs in that case when this contract was signed.

(Same objection, same ruling.)

The eight-inch pipe line referred to in paragraph 3 of the contract was constructed by the Twin City Pipe Line Company and the connections mentioned in said paragraph of said contract made. The line was constructed under my supervision.

Material for that line began to move on the day the contract was signed. Actual work on the construction began on September 3rd, and was completed on September 16, 1926. I know of my own personal knowledge the cost of that construction.

(Same objection, same ruling.)

[fol. 141] I have prepared a statement showing the items of the cost. That statement truly and correctly shows the cost of that construction.

(Same objection, same ruling.)

Thereupon plaintiff offered in evidence Exhibit No. 2. (Same objection, same ruling.)

The said Exhibit No. 2 is as follows:

PLAINTIFFS' EXHIBIT 2

Twin City Pipe Line Company Cost on Laying 8" Cross-over for Harding Glass Plant

8" Pipe, 2,600' @ 1.00	$2,600.00
8" Long Sleeves, 5 @ 10.42	52.10
8" Short Sleeves, 30 @ 3.33	99.90
8" Crane Lapweld Flanges, 2 @ 17.00	34.00
8" Crane 175# Valves, 3 @ 52.00	156.00
8" Crane 700# Valves, 2 @ 66.65	133.30
10" Pipe (Secondhand) used as conduit, 98' @ 1.00	98.00
Welding Iron, 150# @ .15	22.50
Tanks of Oxygen, 9 @ 3.00	27.00
Carbide, 500# @ 5.35	26.75
Labor	561.25
H. E. Tingle	30.00
A. L. Crawford	30.00
H. Griffin	30.00

F. L. Herring	36.00
Palace Drug Company	18.35
Sparks Memorial Hospital	50.00
Dr. Jas. A. Foltz	76.00
	$4,081.65
Engineering Charge, 10%	408.17
Total	$4,489.82

[fol. 142] At the time of the signing of the contract in controversy, the Twin City Pipe Line Company had in Fort Smith two pipe lines, one an eight inch line that starts at the south side of the Arkansas River between Van Buren and Fort Smith and runs in a southwesterly direction along the Frisco Railroad and down North Sixth Street passing at a point northwest of the Harding Glass Company and on down through the so-called factory district which more or less follows the main line right-of-way line of the Frisco to the south city limits of Fort Smith; and a ten inch line running from a point south of the Arkansas river crossing the old Fort Smith Country Club grounds into Eleventh street to Johnson Street; turning south and going in an almost due southerly direction to South Fort Smith. The Twin City Pipe Line Company has in the City of Fort Smith no other main line.

(Same objection to the above, same ruling.)

At the time of the signing of the contract in controversy the Harding Glass Company was connected with the ten inch line above described. The connection was at a point on Johnson Street and Kelley Highway, extending from there over to a point south of the Harding Glass plant where it was connected with the lateral which fed the Harding glass plant. The parties described that connection as at or near the car barn station. It is within a hundred or two yards of the car barn station. The character of connection with the ten inch line is described. It is the lateral that leads from the ten inch line to the Harding Glass Company plant.

Mr. Brown: If your Honor please, in order to save time I would like for the record to show that the defendant objects to each question of this character propounded to the witness on the ground that the questions relating to the construction of the 8 inch connecting line between the Johnson street line and the Sixth street line, any questions pertinent to the construction of that line, or answers, are incompetent and have no bearing on the issues involved in this law suit.

The Court: Very well, that will be understood. (209)

There was an eight inch line from the ten inch line over to what was called the car barn station, which was a point of delivery to the Fort Smith Light and Traction Company where they had a high line intersecting the line of the Twin City. From there to the Harding Glass plant was a four inch line, the latter being approximately nine hundred feet long, as I recall. I have had prepared a blue print or map showing all of the lines in Crawford County, which also [fols. 143 & 144] shows that part of Sebastian County which we take care of through the two lines that I have heretofore discussed. This map or blue print shows approximately the location of the Harding Glass Company. It shows the eight inch line constructed pursuant to the terms of this contract. The plant of the Harding Glass Company is identified on the map and it is circular approximately at a half mile south of the north city limits of Fort Smith. It is identified as circle No. 1. The map or blue print was then introduced as Exhibit No. 3, and is as follows:

(Here follows Plaintiff's Exhibit 3, side folios 145 and 146)

[fol. 147] Beginning from the time that the eight inch line was completed and connection thereto made with the Harding Glass plant, and until five o'clock P. M. on the evening of January 2, 1929, the Harding Glass Company took all of its requirements from the Twin City Pipe Line Company. Prior to the latter date and prior to the filing of the complaint herein the Harding Glass Company notified the Twin City Pipe Line Company that it would cease to take its entire requirements of gas from the Twin City Pipe Line Company. Mr. C. H. Harding came to my office after I had

SCALE 2" = 1 MILE.

Numbered Circles INDICATE POINTS of INTERCONNECTION between LINES, details of which are shown on corresponding Numbered sheets of book of CONNECTIONS

agent. 10/27/26

TWIN D

R.32 R.31

5 4 3 2 1 6 5

8 9 10 11 12 7 8

17 16 15 14 13 18 17

20 21 22 23 24 19 20

29 28 27 26 25 30 29

CITY LIMITS

VAN BUREN

MOPAC

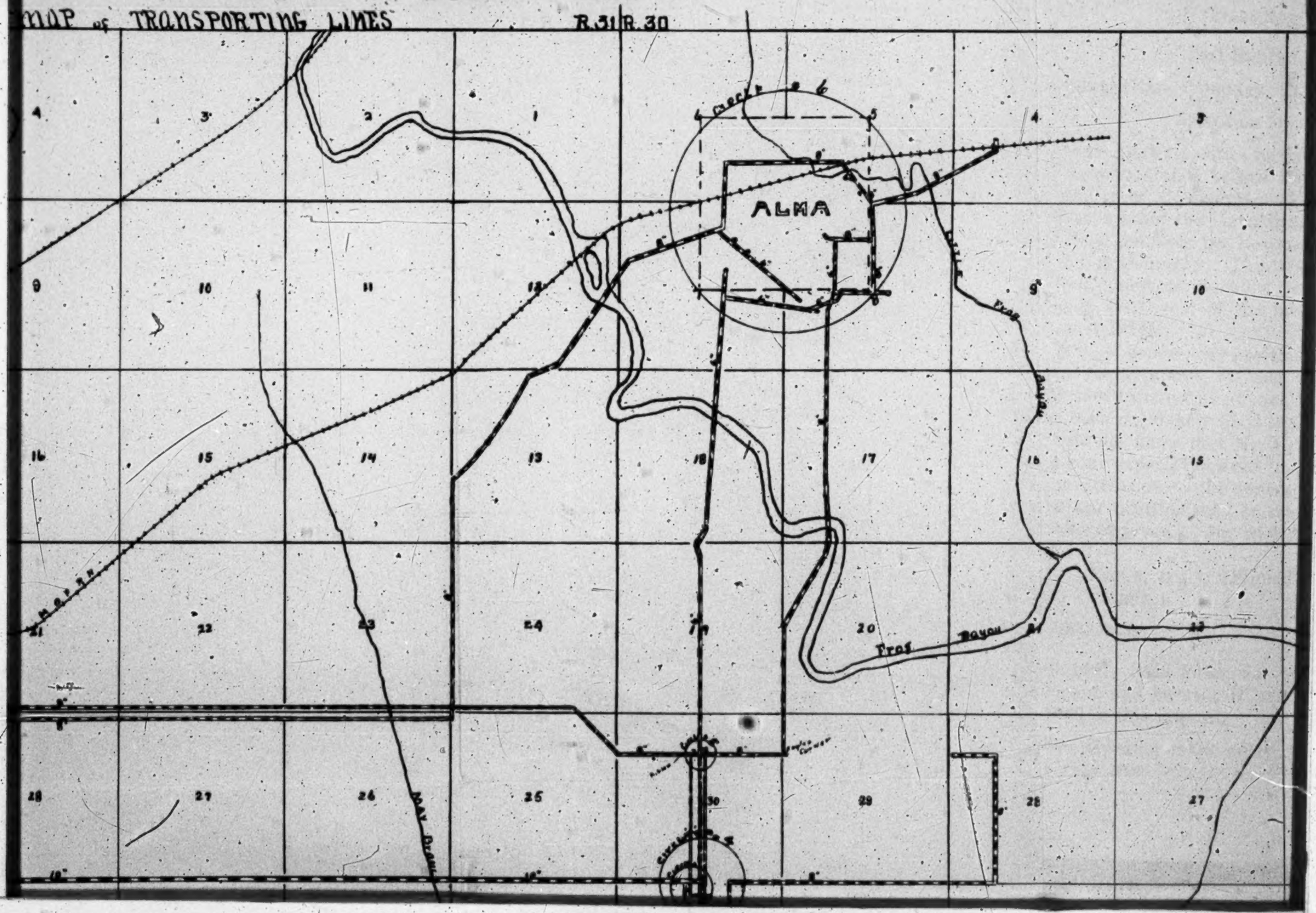
CIRCLE

CIRCLE

PLAINTIFF'S EXHIBIT 3

CITY PIPE LINE CO.

MAP of TRANSPORTING LINES

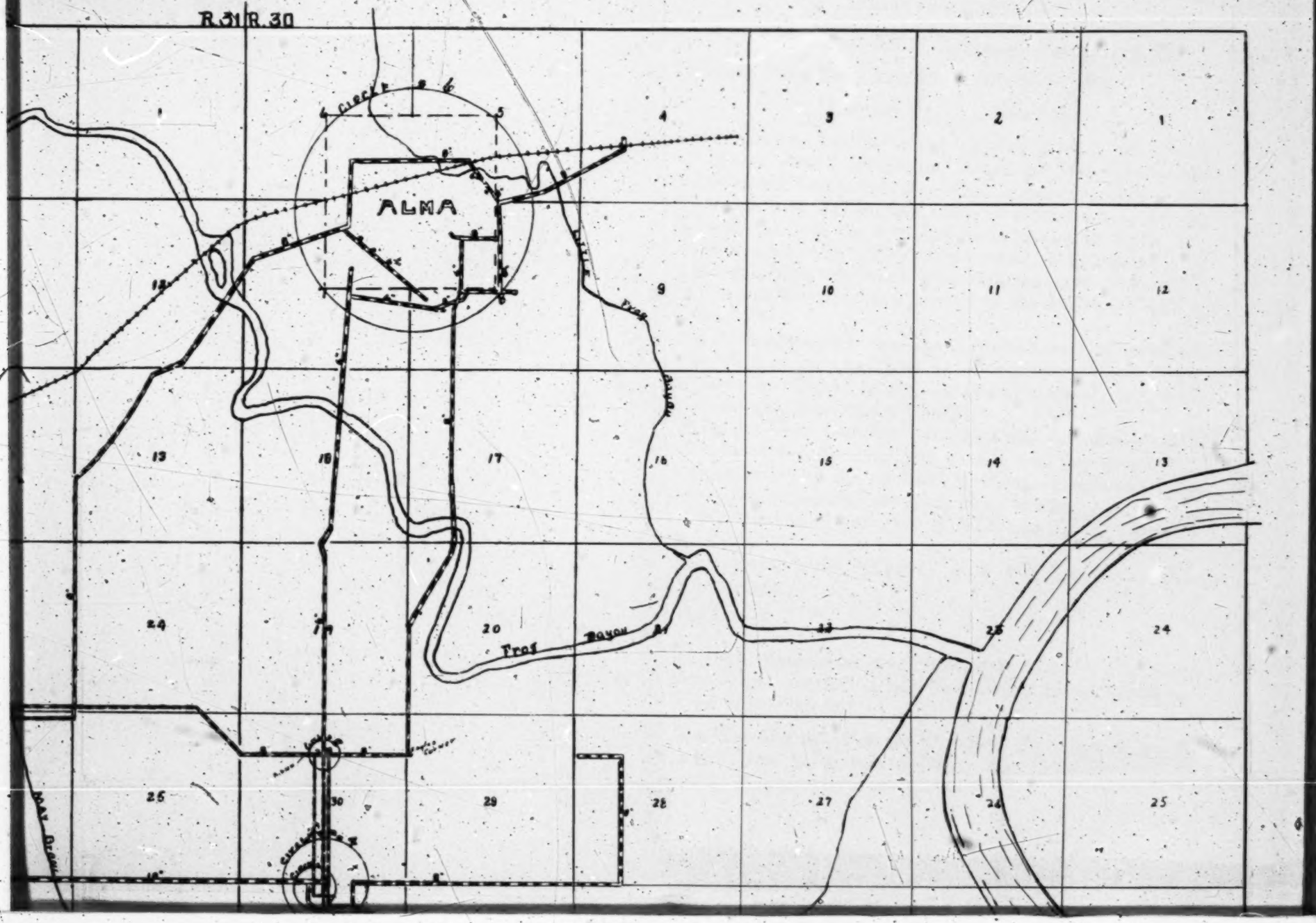


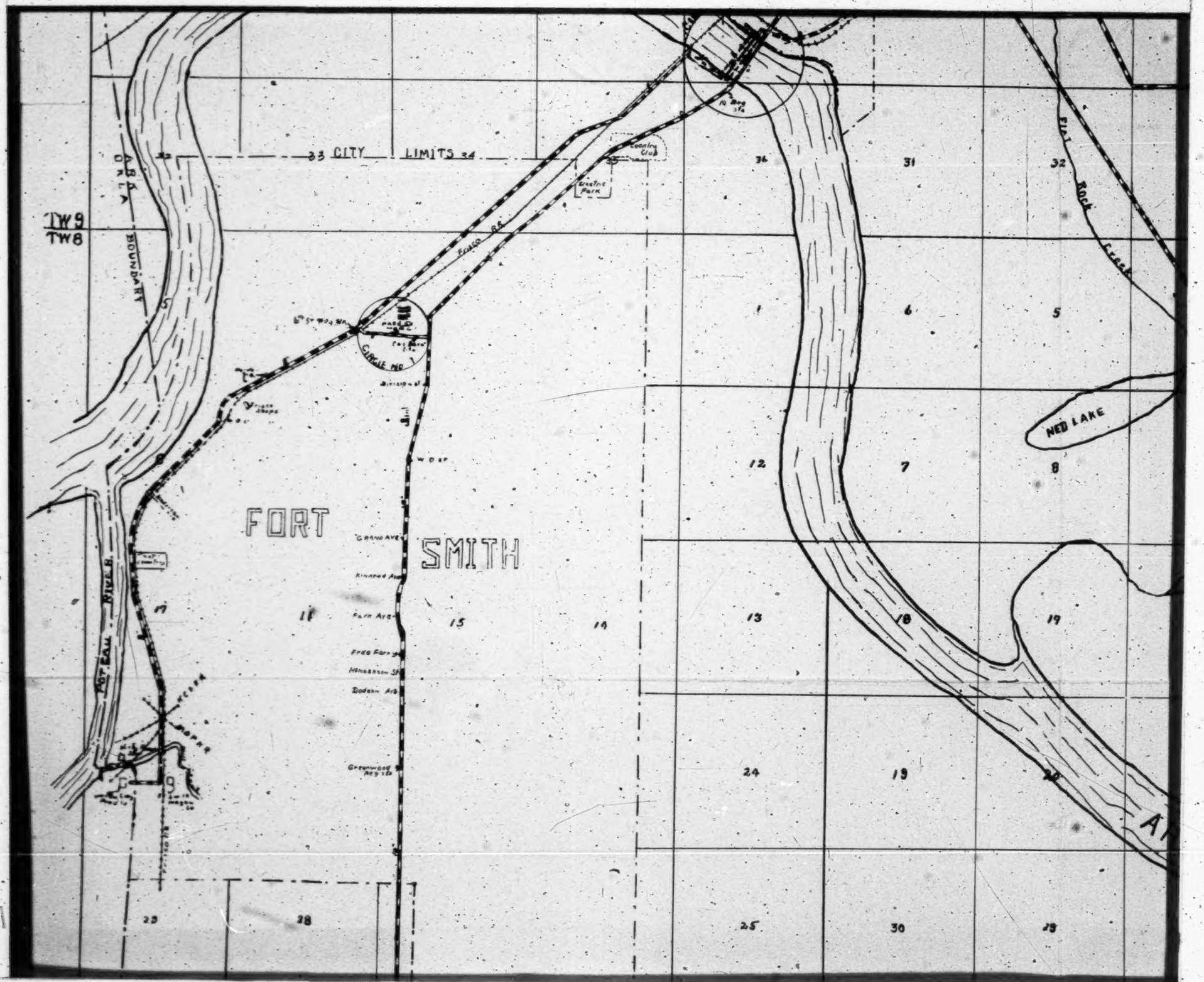
T 3

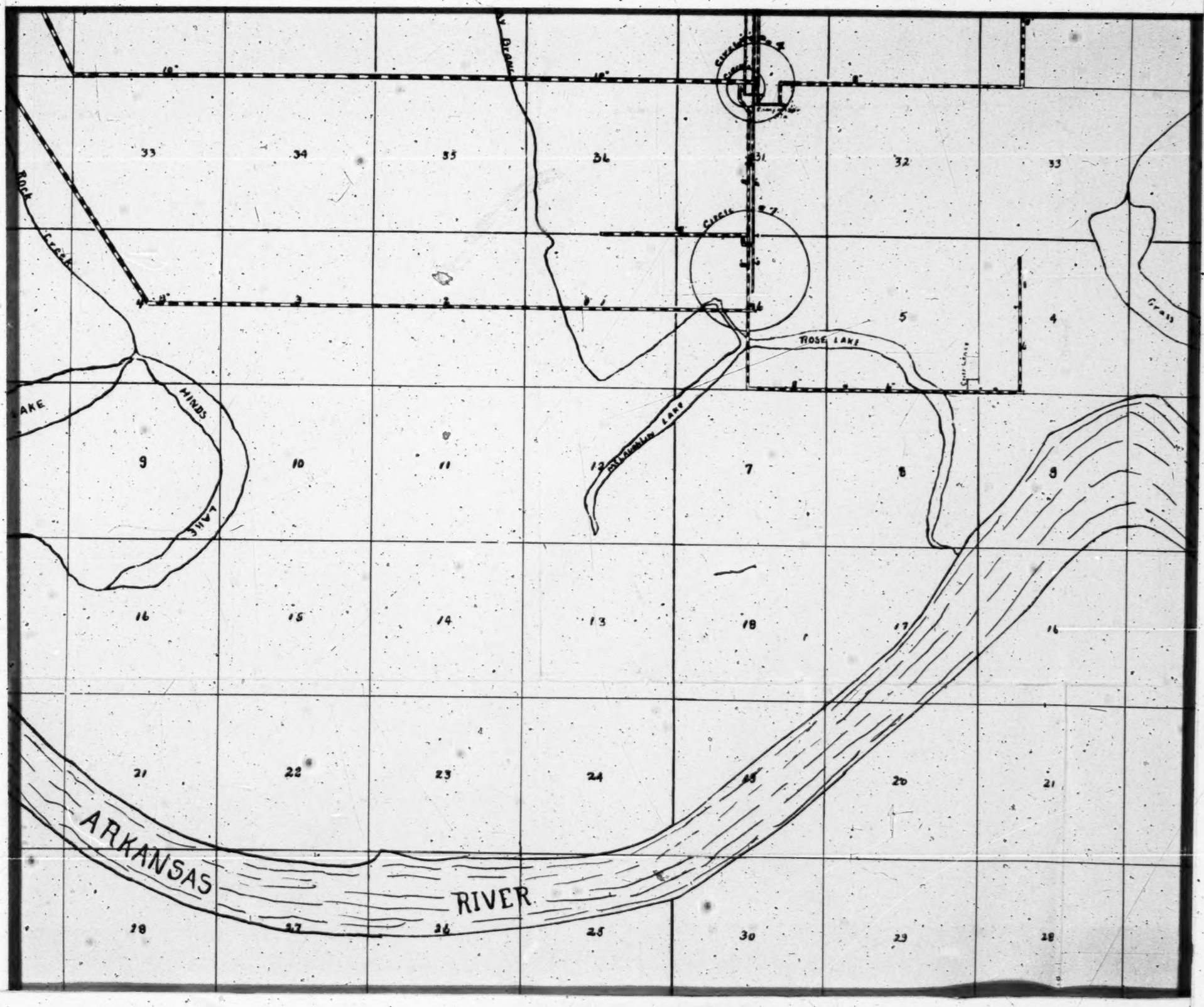
145-146

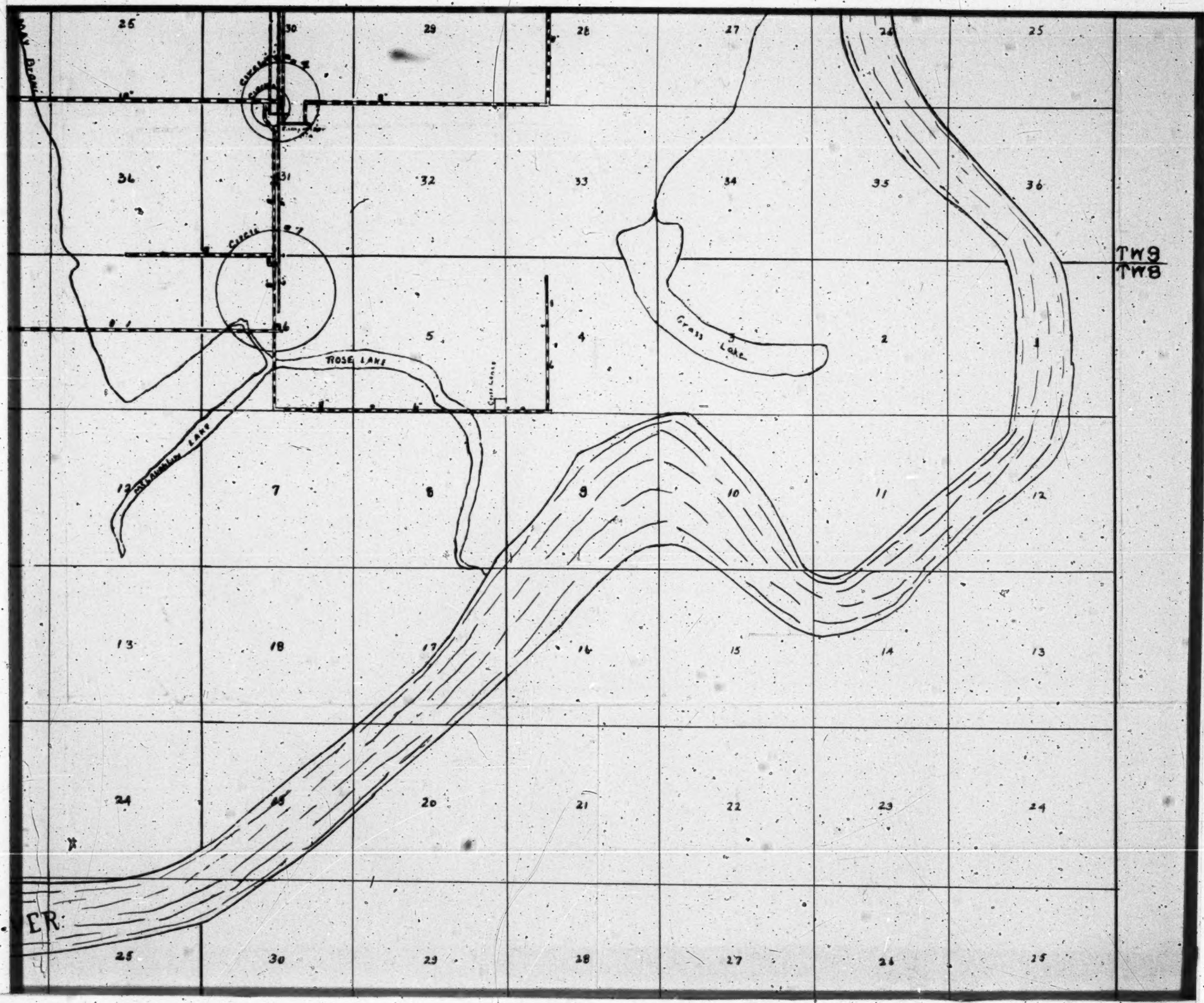
LINE CO.

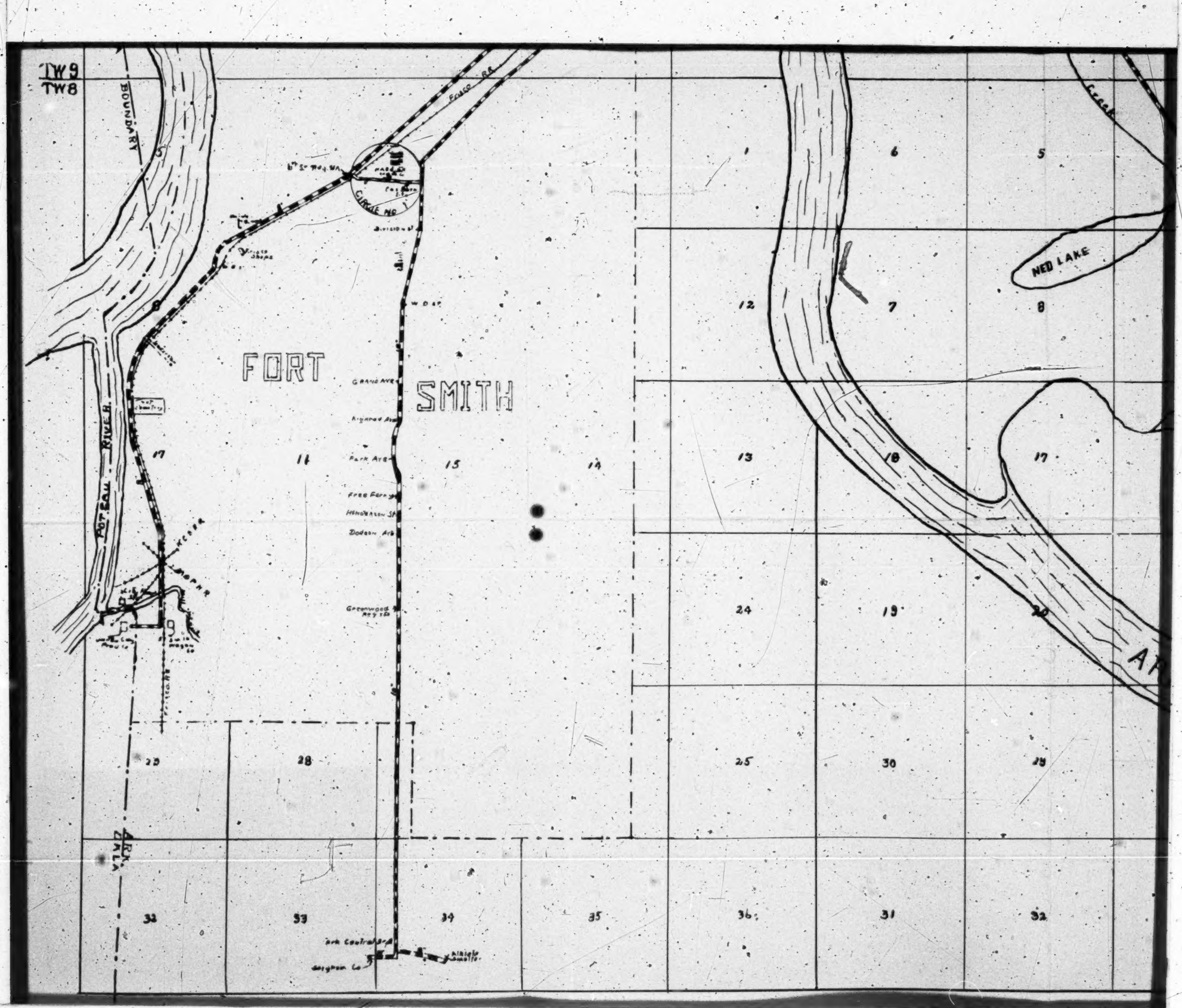
R.31 R.30




33 CITY LIMITS 34
ARK-OKLA BOUNDARY
T9N
T8N
FORT SMITH
NEB LAKE
Flat Rock Creek
Poteau River
Grand Ave
Park Ave
Free Ferry
Henderson St
Dodson Ave
Greenwood Addition
Country Club
Cemetery
Circle Mt.
Jail
Water Tower
Fairgrounds
Ferry
Ferry Landing
Ferry Shops
Ferry Shops
Ferry Shops


Rock Creek
Grass
ROSE LAKE
MINDS LAKE
ARKANSAS RIVER


TWP
TWP
ROSE LANE
Grass Lake
Circle
Circle
Cedar Lake
Subdivision Lane
ER


TW9
TW8
BOUNDARY
FORT
SMITH
GRAND AVE
PARK AVE
Dodson Ave
Greenwood Rd
POST OAK RIVER
NED LAKE
Creek
CIRCLE No. 1
ARKANSAS
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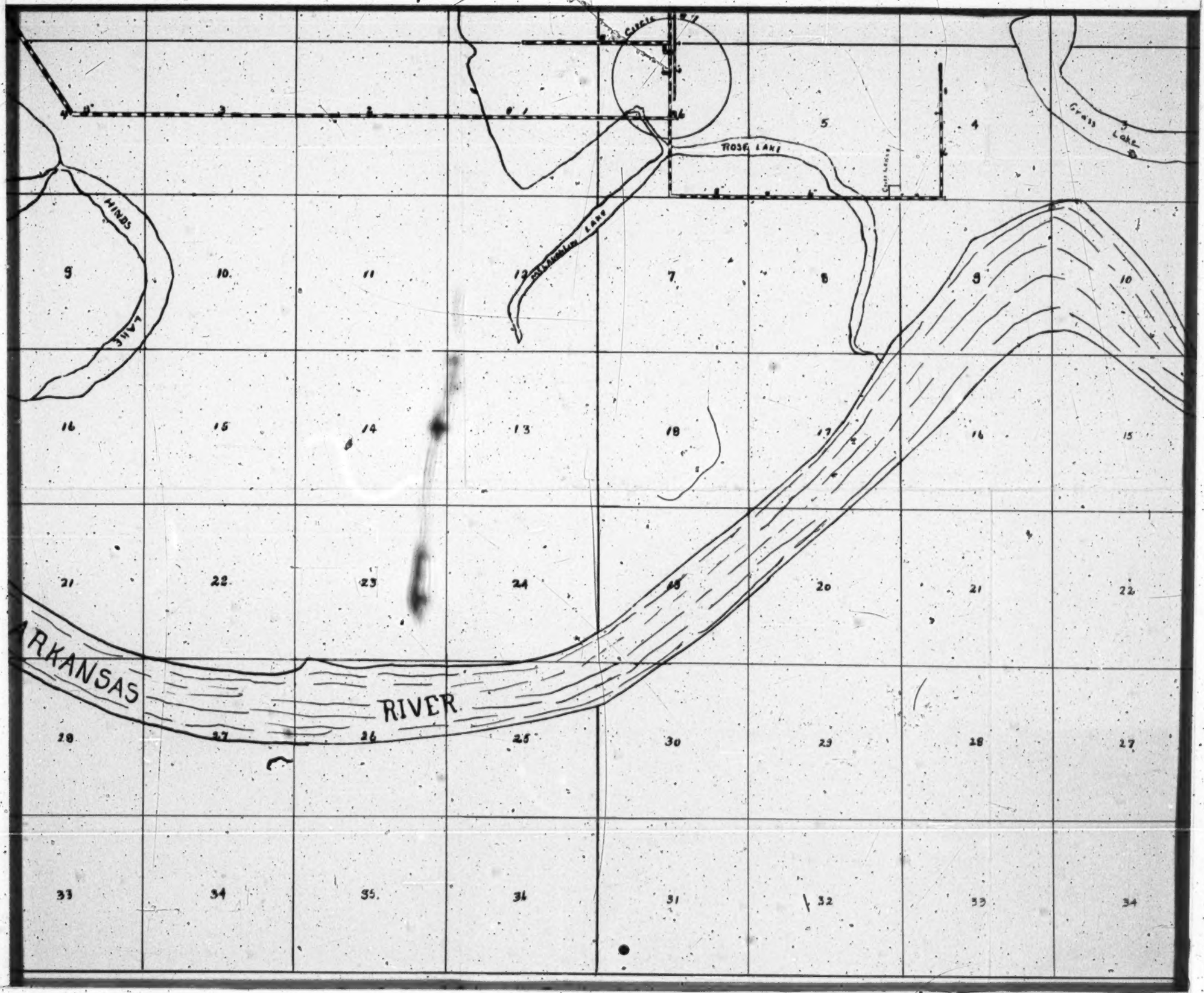
Circle
Grass Lake
Rose Lane
Hinds Lane
Arkansas River
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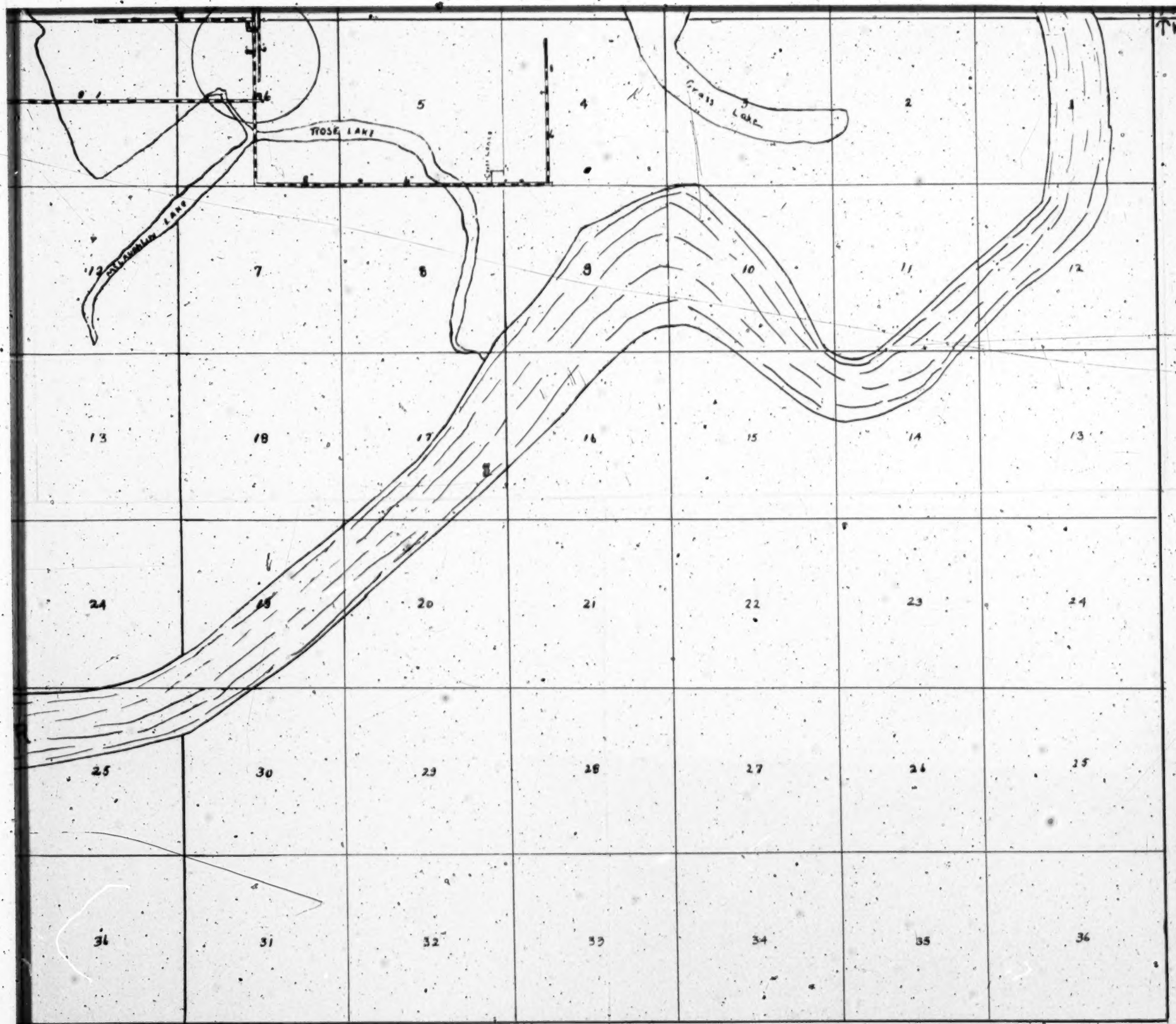

Sebastain County, Ark.)

written him a letter calling attention to the notice in the newspaper of a statement made at some civic meeting in Fort Smith by Mr. H. P. Lyman that the Harding Glass Company would have within a short time completed a line from the Citizens Gas fields in Oklahoma. The letter referred to is dated February 3, 1928, and is as follows:

PLAINTIFF'S EXHIBIT 4

Fort Smith, Arkansas, February 3, 1928.

Harding Glass Company, Ft. Smith, Arkansas.

Attention Mr. C. H. Harding

GENTLEMEN: I notice in this morning's paper that Mr. H. P. Lyman stated before the Board of Directors of the Chamber of Commerce and other civic organizations on yesterday that the Harding Glass Company would soon be burning gas from the Rowland Field belonging to the Citizens Gas Company. This article called my attention to the existing contract between your company and mine which was in settlement of the lawsuit in the Federal Court in August 1926.

It is, of course, our position that you have contracted for your requirements, as long as we can serve them, at the rate now in effect or at such rate as exists hereafter which has been previously fixed legally.

I do not know that Mr. Lyman is well informed regarding your expectations but just wish to take this time to call your attention to the contract hereinabove referred to so that our position may be made clear to you.

Assuring you of our wish to at all times be of service, I am,

Yours, truly, (Signed) A. G. Williams, Jr., Manager.

AEGJr:A.

[fol. 148] Said letter was objected to because it was not relevant and because it had no bearing on the issues involved in this lawsuit.

Mr. Harding called on me in person the following morning that that letter was written. Mr. Harding came to

my office and told me that he had received this letter. He stated that he did not feel that he had received anything from the Twin City Pipe Line Commpany except what he was entitled to as any other customer, and that because of that he didn't feel that this contract was binding. And he further stated that he would like to make arrangements to take service from us in case of what he might be able to take from the pipe line of the Citizens Pipe Line Company or the gas fields in which he was interested was insufficient. I told him that I did not wish to discuss furnishing him less than his entire requirements under the terms of our contract. He then stated that he did not feel that the contract was binding and that if there was any way that he could burn his own gas he intended to do so. And I told him so we might understand each other, that if there was any way that we could hold him to the fulfillment of his contract, that we intended to do so.

The above is the substance of the conversation between us relating to this controversy. Soon after that the construction of a pipe line was started from the Rowland gas field towards the plant of the Harding Glass Company. That was the latter part of December 1928.

The Harding Glass Company, on January 2, 1929, at 4:45 P. M. ceased to take its entire requirements from the Twin City Pipe Line Company. They (meaning the Harding Glass Company) (evidence admitted over objection by defendant) told me they were taking gas from the Citizens Pipe Line Company from the Rowland field, which was the same gas field discussed between me and Mr. Harding. It is the only gas field over there. The Harding Glass Company has since January 2 taken gas from the Twin City Pipe Line Company.

The witness was asked to give the detail of the situation. The evidence was admitted over objection and the witness said (215):

A. They started taking gas from Citizens Pipe Line Company at approximately 5 o'clock on the afternoon of January 2nd, took all of their requirements until 12:45 that night, then they came back on us for all their requirements for 45 minutes, and then they took no gas from us [fol. 149] for an hour and a half, and then came back on us

for their full requirements again for 45 minutes, and then turned us off and no gas was taken from us the next day,—for three days. Then they came on us at 9:45 on the morning of the 6th. and stayed on until——

The Court: Sixth of what?

A. Sixth of January and stayed on until 1:45 the same day when they went off entirely coming back on for their full load that afternoon at 6:35, staying on then through the 7th and 8th until 7:30 the morning of the 9th of January, going off at 9 o'clock that night. Then they stayed off until,—no, they were on from that time on for a small amount of gas.

Q. You mean on your line?

A. Yes; so small that the meter that was then in place could not record it, and I wrote a letter to Mr. Harding telling him the situation.

Q. Have you that letter?

A. Yes, I have a copy of it.

Mr. Brown: No objection to it on account of it being a copy, but the defendant objects to the introduction of that letter on the ground that it is irrelevant and has no bearing on the issues of this case.

Q. The letter dated January 10, 1929 which the stenographer has [no] identified as exhibit 5, is that the letter which you wrote to the Harding Glass Company?

A. It is.

The Court: Do you object to this?

Mr. Brown: Yes, sir, we object to it.

The Court: Objection is overruled.

Mr. Brown: Exception.

Said letter being in words and figures as follows:

PLAINTIFF'S EXHIBIT 5

January 10, 1929.

Harding Glass Company, Fort Smith, Arkansas.

Attention Mr. C. H. Harding, President

GENTLEMEN: We notice by the chart which this morning came off the meter through which the gas passing from

our line to your plant is measured, that you are now taking [fol. 150] such a small amount of gas from us that the meter as heretofore installed can not measure same. It is, therefore, necessary that we immediately change the plate in this meter to take care of the volume now being taken by you. This we have done and this is notice to you of our action which was brought about by your changed operating condition.

The same orifice plate which will accurately measure your entire requirements is too large to accurately measure volumes such as you are now taking.

We stand ready to serve you your full requirements of gas and will upon reasonable notice from you put in the equipment necessary to measure same.

Yours truly, Twin City Pipe Line Company, by (S.) A. G. Williams, Jr.

AG JR:A.

Registered—Special Delivery—

Q. Following the letter of January 10, 1929 did you in pursuance to that letter put the plate in mentioned in that letter?

A. Yes.

Q. And a new meter? I don't know whether you did or not.

A. No; not a new meter. The meter remains the same size. There is a thin disk called an orifice which slips in behind a flange, and it is about ten minutes work to make the change.

On the first day of January 1929, the Harding Glass Company consumed 1,223 M. Cu. Ft. of gas during the 24 hours full load. That was a holiday, and not the load the Company would ordinarily take. The full load most of the time runs a little higher than that. Approximately that is the full load. That was fairly constant during the 24 hours, about as constant a load as a gas company can have. It was a very even load. The hourly consumption would be approximately the 24 hour load divided by 24. With the meter that the Company had out there at that time it would not register 1,224 M. Cu. Ft. with the plate that was then in it, and at the same time measure a very small amount of gas if they would take a very small amount

of gas. That type meter has a range of accuracy approximately one and five. It will record gas accurately from a minimum to five times that minimum, and beyond that its [fol. 151] range of accuracy ceases. If their takings of gas decrease suddenly in a bigger proportion than five to one down, or one to five up, the meter will not register. It will be off the plate, or so close to the head that it is impossible for anybody to get accurate readings. There is no piece of equipment made that will accurately register the takings of gas of the Harding Glass Company ranging from a thousand feet of gas a day, or fifty thousand feet a day up to 1,200,000 Cubic Feet a day without making changes of the orifice through which it flows.

Q. Did you call upon Mr. Harding in any conference that you had with him to see if he could find any meter that would read accurately all ranges of gas?

A. No, Mr. Harding came to my office following his receipt of that letter and asked me if we couldn't make an installation of that kind supplying them; that there would probably come times when they would have to have their full requirements from us. And I told him that there was no such piece of equipment in existence that I knew of, and that if he was able to find one I would be very glad to go out and install it. He never came back and suggested it. I do not think he was able to find one. Immediately following the change of the plate,—before we changed the plate we could not do anything but estimate the gas. After the change of the plate their consumption dropped to 46,000 on the 11th, and from the 11th, 12th, 13th, 14th, 15th, 16th and up to 9:30 in the morning on the 17th they took less than 50,000 feet of gas. Mr. Wayne Harding called me up and told me they were doing some work on their equipment and they would like to have us arrange to give them more gas, and we sent out and put in a plate which would take care of their requirements. For the balance of that day their requirements jumped to 950,000. Cubic Feet. Then the 18th, 19th, 20th, 21st, 22nd, 23rd, 24th, 25th, 26th and 27th, and until the close of that month they were back on us for their full requirements, taking from a million one hundred thousand to a million two hundred fifty thousand. To change that plate required only ten minutes. The meter was out of commission only ten minutes.

From the time of the signing of the contract the Harding Glass plant had not had any shut down.

"Q. I mean did they quit taking their full requirements by reason of shut downs in their plant at any time?

A. Yes."

"Q. The point I am getting at, prior to this controversy after you put in different plates?

[fol. 152] A. Always as their load would change, we were not even notified, we would send out and put in a larger or smaller plate, that is done every time they shut down, as they come up to their full requirements it is done."

The Twin City Pipe Line Company now stands ready and has been at all times to furnish them their full requirements. I do not recall a day from the time of the signing of the contract that the Harding Glass Company has not received its full requirement. There has never been a time since the signing of the contract that the Twin City had an insufficient supply of gas to take care of the supply for the Harding Company. The Twin City is now better equipped to take care of its customers than it was at the time of the signing of said contract. The Twin City has at this time facilities for delivery that far exceed what they had at the time of the signing of the contract. That refers to gas connected into our lines, changed over by installation of pumping equipment and other things that go along with the maintenance of a gas business. Have been connected with the Twin City and the Industrial since January 1919. The Twin City Pipe Line Company gets its gas from the Industrial Oil and Gas Company. The latter is one of the plaintiffs in this lawsuit. The Industrial Oil and Gas Company is a private corporation, engaged in the production of natural gas.

(Objected to on the ground that the articles of incorporation would be the best evidence.)

The Industrial Oil and Gas Company is engaged solely in the production of gas. Its gas wells are in Crawford County, Arkansas. The wells drilled by the Industrial Oil and Gas Company were drilled under my supervision. The Industrial Oil and Gas Company, since the signing of the contract has drilled thirteen wells, Eight of these were producing wells. Since January 1, 1926, said Industrial

Oil and Gas Company has drilled nineteen wells. Thirteen of that number were producing wells. All of these producers are in new fields with which the Twin City was not connected on January 1, 1926. I have prepared a statement showing the wells which have been drilled by said Company since January 1, 1926, with the name of the well and the date of its completion.

The said statement over defendant's objection, was admitted in evidence, and is as follows:

[fol. 153] PLAINTIFF'S EXHIBIT 6

Industrial Oil and Gas Company

Development Cost from January 1, 1926, to January 31, 1929

Well	Date	Value
Paul #1	2-4-6	$4,856.89
Lewis #1	3-4-26	6,306.47
Paul #2	4-11-26	7,682.54
Lewis #2	4-22-26	5,116.51
Jones	5-23-26	7,604.28
Mausz	5-31-26	8,346.20
Morton (Lester)	8-19-26	5,969.70
Total Development to Aug. 31, 1926		$45,882.59
Sullivant	9-1-26	4,632.00
Ross	10-3-26	3,131.49
Kimbrough	1-20-27	7,162.37
Dougherty #1	3-8-27	3,707.49
Bryant	4-8-27	7,128.48
Harris	5-28-27	6,328.63
Browlee	7-23-27	4,482.81
Hurst	7-27-27	7,664.58
Dougherty #2	9-14-27	6,856.92
Neal	9-12-27	7,045.51
Roberts	4-12-28	6,173.67
Creekmore	9-5-28	9,299.74
Total development September 1, 1926 to date		$73,613.69
Total Development		119,496.28

Six of said wells are in the smelter area.

Q. At the time there was a shortage of gas in 19—you recall, do you, the trial of the former law suit between the same parties a record of which has been introduced in evidence, where there was for a few days in the winter time there was a shortage of gas and you couldn't supply the Harding Glass Company's requirements?

A. I do.

At that time the Industrial Oil and Gas Company had not discovered the smelter field. That field is about two miles north and about three miles west of the old Kibler field. It is about three miles west of the Alma field. Until the date of the signing of the contract in controversy the Harding Glass Company actually paid the Twin City Pipe Line [fol. 154] Company for gas delivered ten cents a thousand cubic feet. The Twin City was at that time billing the Harding Glass Company at the regular schedule of rates that had been made sometime in January, 1925. By schedule of rates is meant the schedule of rates fixed by the City Commission for industrial consumers, which was afterwards tried in this court. That rate was twelve-fifteen cents. That is, 15 cents for the first million feet, 14 cents for the second million feet, 13 cents for the third million feet, and all over three million used in one month was 12 cents a thousand.

Beginning with the first day of September after the signing of this contract, the Harding Glass Company was billed at that schedule of rates, to-wit: the 12-15 cent rate. Since the filing of this suit a new schedule of rates for industries has been put into effect. That was put into effect through the approval of the City Commission of the City of Fort Smith, and is on file with the City Commission. That rate is fifteen cents for the first three million and 13 cents for all over three million. Neither the Harding Glass Company nor any of its representatives appeared and no industry appeared before the Commission in the City of Fort Smith and offered any objection to me or to the city that I heard of.

Thereupon the said witness (229) A. G. Williams, Jr., testified further as follows:

In my judgment the supply of gas now on top of the ground, and in the wells now developed is sufficient to en-

able the Twin City Pipe Line Company to furnish the Harding Glass Supply and other customers—I feel confident that the supply of gas will be adequate from the wells that we now have drilled to take care of all the customers of the Twin City Pipe Line Company for from four to five years.

The witness was then asked by the court to explain what is meant by gas that the Twin City Pipe Line Company had on top of the ground. The witness said the Twin City Pipe Line Company has no gas on top of the ground, but through the Industrial Oil and Gas Company has a contract or agreement. The expression "on top of the ground" means gas already drilled for closed in under control of the operator, whose open flow or volume available for use would be sufficient to take care of the demand. The expression means that the gas is available to one on top of the ground. Counsel said "What I meant by that question was wells already drilled and connected with the pipe lines [fol. 155] of the Twin City Pipe Line Company and now used in furnishing gas." The witness answered: "Yes, used or useful. We are only taking gas now from probably forty wells and we have right at two hundred available. They are all connected with the pipe lines." The Company has taken some gas from all of them. The open flow of those wells and the decrease of the open flow is approximately known to me. I have not the figures. The figures are available. The Company keeps records of that. I know what the decrease has been. I know generally what the decrease in rock pressure has been. My judgment and estimation as to how much longer gas can be taken from those wells is based on the decline in pressure for volume taken. This means over a period extending back to 1916 in the earliest fields and a period of not less than three years on any of them except the Shibley area which is brand new. The Shibley area means the smelter area. Do not know exactly how much gas has been taken from the smelter area. Have had that gas on only a couple of days all told. That was last winter. The Industrial Oil and Gas Company owns other acreage still undeveloped which, in my judgment, will produce gas. Its acreage is over eleven thousand acres. Have continued to pay rentals on all that acreage since this contract was signed. Have acquired acreage for future potential supply. There is gas that

the Industrial Oil and Gas Company is now buying and furnishing to the Twin City Pipe Line Company which it was not furnishing to the Twin City Pipe Line Company at the time this contract was signed. That gas comes from the so-called Gans field in Oklahoma, Sequoyah County. That gas comes from a pipe line which extends from the said Gans field approximately 16 miles from Fort Smith, to a point of intersection with the Twin City Pipe Line Company's line on First Street in the City of Fort Smith. That gas comes across the free bridge at the foot of Garrison Avenue.

In the conversation with Mr. Harding above detailed he made no complaint that he had not been furnished his full requirements since the contract had been signed. Up until the filing of the answer in this case the said C. H. Harding did not suggest that the Twin City was unable to adequately supply the requirements of the Harding Glass Company. Have prepared exhibits which I know to be correct showing the varying requirements of the Harding Glass Company for the years 1925, 1926, 1927 an 1928 by months. Exhibit No. 7 shows correctly said takings of gas. During those four years the Harding Glass Company took its entire [fol. 156] requirements from the Twin City Pipe Line Company. The eight inch line that was built (234) under the terms of this contract connecting with the ten inch line and connecting with the Harding Glass Company's plant would not be of any service or benefit to the Twin City Pipe Line Company except to serve the Harding Glass Company. The resale value of that line, less the cost of taking it up, will amount to probably five thousand dollars net. Since that connection has been put in Harding draws all of his supply of gas under all ordinary conditions from our main 10 inch line. There has been once or twice that I recall when something happened on the 10 inch when we had to switch him on the 8 inch. We have no other industrial customers who are connected with both the 10 inch and the 8 inch line. The 10 inch line will supply all of Mr. Harding's requirements and all the other customers requirements along that line under all normal conditions. At one time some tramps set fire to the 10 inch regulator station south of the free bridge at Van Buren about midnight one night and service was discontinued on that line until about 9 o'clock the following morning. Again the City, or State, or both, began

paving out there on Eleventh Street and we received notice to lower the lines and get them from under the pavement. We had to discontinue service through that 10 inch line for approximately three weeks at that time while we were rebuilding. During that time we were serving the Harding Glass Company through the 8 inch connection. During the flood of 1927 the 8 inch line washed out along the bank of the river south of Van Buren, and, of course, it was out for a period of several days until the water ran down and we could get in there and renew it. Those are the only instances I recall where there has been a cessation of service on both the lines. Both the 10 inch line and the 8 inch line cross the river bottoms. Before they get to the great floods, in period of great floods like that of 1927, both are submitted to overflow. The Industrial Oil and Gas Company has never sold any gas to anybody except the Twin City Pipe Line Company. It has no other customer other than the Twin City.

No other pipe line company has a pipe line where those fields are to whom it could sell gas. Since the organization of the Industrial Oil & Gas Company it has never had any customers except the Twin City Pipe Line Company.

(The following was admitted over defendant's objection and exception on the ground that it was not relevant or ma-
[fol. 157] terial, and on the further ground that if it was an issue in the former case that it was not an issue in this case:)

I was present during the entire trial of the law suit No. 448 Equity. I testified in that former case to that situation, that is—that the Industrial's sole customer was Twin City Pipe Line Company. The officials of the Harding Glass Company, C. H. Harding, Wayne B. Harding, and its attorneys, were present when I gave this testimony.

Exhibit No. 7 above referred to is in words and figures as follows (R. 237):

PLAINTIFF'S EXHIBIT 7

Takings of Gas by Harding Glass Company from Twin City Pipe Line Company

	1925 M cu. ft.	1926 M cu. ft.	1927 M cu. ft.	1928 M cu. ft.
January	75,871	87,325	81,690	74,859
February	71,807	77,633	53,004	54,847
March	83,625	81,904	41,731	40,455
April	52,488	40,052	40,087	40,339
May	38,488	39,822	40,495	42,477
June	37,012	41,530	39,454	36,338
July	39,702	40,532	42,445	33,214
August	41,264	49,194	42,688	32,997
September	74,241	72,290	67,861	33,752
October	88,582	79,494	43,915	34,100
November	87,055	75,898	40,413	34,049
December	86,875	78,410	48,456	35,155
Total	776,920	764,084	582,239	492,592"

Cross-examination.

By Mr. Donough:

Q. Mr. Williams, in Exhibit No. 6 introduced as an exhibit to your testimony this forenoon, the first item is Well Paul No. 1. The date is given as February 4, 1926. Does that date mean the date of the finishing of the well or the beginning of it?

A. The completion.

Q. Following that under the word "value" are the figures $4,856.89. Does that mean the cost of the well or the value of it?

[fol. 158] A. It means the total cost of drilling that well.

Q. You have not itemized that cost?

A. No, sir.

Q. It is itemized on the company's books, is it?

A. Yes, sir.

Q. Is any part of that cost made up of pipe?

A. Yes, sir.

Q. How much of it?

A. I couldn't tell you offhand. There is a string of 3 inch pipe there and 200 feet of 8 inch casing. Approximately something over a thousand dollars of it, a little over a thousand dollars would be the cost of the pipe, the balance would be the drilling expense.

Q. What is the diameter of that pipe?

A. The final string of pipe is 3 inches.

Q. And what is the largest diameter of the pipe used?

A. Ten inch is my recollection.

Q. And it connects with a ten inch main?

A. No.

Q. Do you include in that well the cost of the pipe from the main, and by the main I mean the line that conveys the gas out of the field to the well itself?

A. It includes the material that was necessary to shut that well in in an operating condition.

Q. Does it include any pipe line at all?

A. No, sir, it is just the cost of the well equipment that has to bring the gas to the top of the ground.

Q. The pipe that is laid to transport that gas is not charged as a part of the cost of the well?

A. O no, that does not belong to the same company.

Q. The pipe belongs to the Twin City Pipe Line Company?

A. Yes, sir.

Q. And the well belongs to the Industrial Oil & Gas Company?

A. Yes, sir.

Q. Where is the well located?

A. It is on what is known as the east extension of the Alma field and is about a mile and a half to a mile and three-quarters east of Alma, Arkansas.

Q. Is it on the map that was introduced this morning?

A. There are no well locations on the map, that map shows pipe lines only. I can point out the approximate locations.

Q. Alma is on that map isn't it?

A. Yes, sir.

Q. Now how far east of Alma?

A. That well is right——

Q. I asked the question how far from Alma?

[fol. 159] A. A mile to a mile and a quarter.

Q. And is it located in Section 4?

A. Yes.

Q. That section 4 is shown on the map?

A. Section 4, Township 9, Range 30, Crawford County.

Q. Now where is the Lewis well No. 1?

A. It is also in the same section.

Q. How far from the Paul Well?

A. A quarter mile.

Q. What direction?

A. Northeast.

Q. The cost of that you have given under the word "value" as $6,306.47. Is any part of that cost pipe?

A. Yes.

Q. How much?

A. That well is tubed with 2 inch and it has a short string of 8 inch.

Q. That is the pipe in the well?

A. Yes.

Q. That does not include any pipe outside of the well?

A. No.

Q. The next well is Paul No. 2, where is that located?

A. That is a quarter of a mile southeast of the Paul No. 1.

Q. That too, is still in Section 4, is it?

A. Yes, sir.

Q. The next well is Lewis No. 2, where is that located?

A. That is a little better than a quarter of a mile south of the Paul No. 2.

Q. That Lewis means that it is on land belonging to Lewis?

A. Yes.

Q. Is that in Section 4 also?

A. Yes.

Q. The next well is Jones, where is that located?

A. That is a little bit over a quarter of a mile from the Paul No. 2, out west.

Q. The next well is called Mausz, where is that located?

A. That is approximately 2000 feet northwest of the Jones well back closer to Alma.

Q. And the Morton well is located where?

A. That was a dry hole drilled in Section 2, Township 9, Range 30.

Q. That is nearly a mile east of the other wells that you have just described?

A. Yes, just about a mile east.

Q. And is part of the cost of that the pipe?

A. No, sir, there was no pipe left in that hole.

Q. It was taken out?

A. It was all taken out and it was made a deep test. That well went considerably over three thousand. That is [fol. 160] the drilling cost. The pipe placed in the hole was credited back against the hole when it was pulled.

Q. And how deep was that well?

A. Something over three thousand feet.

Q. About how much?

A. It was less than 3100 feet.

Q. About what was the depth of the other wells generally, those that I have already asked you about?

A. Two of those wells are in the shallow sand.

Q. At a depth of what?

A. Approximately 1700 to 1800.

Q. What were those two?

A. Lewis No. 2 and Paul No. 1.

Q. What about the others?

A. They are in the so-called deep sand.

Q. At a depth of what?

A. 2700 or 2800.

Q. Your exhibit then reads "Total development to August 31, 1926, $45,882.59." That means the sum of the cost or value of that column on the right?

A. Yes, sir.

Q. And that includes the wells and only the wells that are shown to be finished on the date found under the column Date?

A. Yes, sir.

Q. Do you know when the first one of those wells was commenced, have you a recollection about that?

A. No, but it takes about fifty days to drill them.

Q. The first one appearing on this list was finished on February 4, 1926. That would mean that that was commenced about sixty days before that?

A. That well was a shallow sand well and was drilled very rapidly. That well was started about the first of the year.

Q. Can you tell about when each of the other wells started?

A. Only figuring generally the average length of time. I can get the record when it was started.

Q. Is the Lewis No. 1 a shallow well?

A. No, that is a deep sand well.

Q. And that would take about sixty days?

A. Yes.

Q. The next well is the Sullivant well, the date is September 1, 1926. Where is that well located?

A. That is in Section 13, Township 8 Range 31, Crawford County.

Q. Is that shown on this map?

A. The section is shown. The location of the well is not shown.

[fol. 161] Q. Section 13, that is located a mile and a half or two miles southwest of Alma?

A. Yes, sir.

Q. How deep was that well?

A. Deep sand well.

Q. What was the production of that well?

A. About a half million feet of gas.

Q. What was the production of the Paul well, the shallow well?

A. The original?

Q. Yes.

—. Over six million.

Q. And the Lewis well No. 1?

A. Over ten million.

Q. Paul No. 2?

A. Seventeen million.

Q. Lewis No. 2?

A. Four million.

Q. Jones?

A. Seven million.

Q. Mause?

A. Eighteen and a half million.

Q. Morton?

A. Dry hole.

Q. And the Sullivant well you gave a while ago. The Ross well is located where?

A. That is in a new area in Section 22-9-31.

Q. What was the depth of the Ross well?
A. Right at 1400 feet.
Q. Was that a producing well?
A. Yes, sir.
Q. The cost of that is given as $3,131,49?
A. Yes, sir.
Q. That included the pipe in that well?
A. Yes, sir.
Q. The next is Kimbrough well, where is that?
A. That is in section 22, same township and range.
Q. What was the depth of that well approximately?
A. Twenty-seven hundred feet.
Q. And the next well on this is Dougherty No. 1, where is that?
A. That is in Section 15-9-31.
Q. Immediately north of the other section?
A. Immediately north of the Ross well.
Q. What part of the section is that in?
A. 165 feet north of the south line at the center of the section.
Q. The next is the Bryant well, where is that located?
A. It is in Section 22-9-31.
Q. That is south of the one last described?
A. It is right down here (indicating).
Q. That was near the pipe line?
A. It is a little over a quarter mile north of the pipe line.
Q. And the next one is the Harris well, where is that located?
A. That was in Section 2-9-30.
[fol. 162] Q. That is some three miles east of Alma?
A. Yes, sir.
Q. What part of the section was it in?
A. It is in the center of the Northwest of the southeast.
Q. Was that a producer?
A. No; sir.
Q. The cost of that is given here as $6,328.63. Did that include any pipe?
A. Yes, sir, there was 1200 feet of pipe 6⅝ths 24 pound casing left in that hole that we couldn't pull, charged against it. We got all of it but that.
Q. How deep was that well?
A. Right at 3100 feet.

Q. The next is the Brownlee well, where is that located?
A. That is in Section 22-9-31.
Q. What part of the section is that in?
A. It is in the Southwest quarter of the Northwest.
Q. How deep was that well approximately?
A. Fourteen hundred feet.
Q. Was that a producer?
A. Yes, sir.
Q. The pipe is included in the cost?
A. There is nothing left in that but a string of 3 inch tube.
Q. The pipe is not included in this cost?
A. That pipe is, the three inch tubing left in the hole.
Q. The next is the Hurst well, where is that located?
A. Section 15-9-31, Southeast Quarter of the Southeast Quarter.
Q. And what was the depth of that?
A. Right at 2800 feet.
Q. The next is Dougherty No. 2, where was that located?
A. That was drilled in Section 15, same township and range as the other Dougherty well.
Q. At what depth?
A. That well was 2770 feet.
Q. A producer?
A. Small producer in the upper sand, dry in the deep.
Q. The Neal well is located where?
A. Section 15, Northwest Quarter. I have forgotten just the location of that. It is the Northwest Quarter.
Q. Was that a producer?
A. A small one, very small.
Q. And the Roberts well was located where?
A. Section 14-9-31.
Q. Was that a producer?
A. No, sir, dry hole.
Q. How deep was that?
[fol. 163] A. It went better than 2800 feet.
Q. The next is Creekmore, where is that?
A. It is in Section 10-8-31. That is a brand new area.
Q. What part of the section was that in?
A. Close to the center. It is in the southwest quarter of the Northwest quarter of Section 10.
Q. Was that a product?
A. Yes, sir.

Q. How much?

A. Four million, 2950 feet deep.

Q. In the exhibit No. 7, as I understand it, you have given the takings of gas by the Harding Glass Company from the Twin City Pipe Line Company covering the years by months?

A. Yes, sir.

Q. Beginning January 1925 and coming down to December 1928, including December, 1928?

A. Yes, sir.

Q. You haven't figured up the amount of the gas shown by that statement which was taken after the making of this contract down to October 1, 1928, have you?

A. Yes, it is included in that statement.

Q. You have not figured it up; it could be figured?

A. Yes, it can be figured.

Q. These are the figures showing the quantity of gas which you collected from the Harding Glass Company, its bills for furnishing it gas?

A. Yes, sir, those were the volumes in thousand cubic feet.

Q. In Exhibit No. 2 to your testimony which is entitled Twin City Pipe Line Company cost on laying 8 inch cross-over for Harding Glass plant, you have 8 inch pipe 2600 feet at a dollar. Does that mean a dollar a foot?

A. Yes, sir.

Q. $2600.00. Have you in the books invoices covering that pipe?

A. Yes, sir, it cost $1.037. They are available if you want them.

Q. Was that the cost delivered at the place where it was put in?

A. F. O. B. car at Fort Smith.

Q. Was that pipe new?

A. Yes, sir, never been used.

Q. In the same exhibit you have ten inch pipe second-hand used as conduit, 98 feet at a dollar a foot?

A. Yes, sir.

Q. That means a dollar a foot, does it?

[fol. 164] A. Yes, sir.

Q. And this ten inch pipe is more expensive than the 8 inch was?

A. Yes, sir, that ten inch pipe new cost $1.98. New eight inch pipe would cost $1.035.

Q. And the ten inch would cost nearly a dollar more?

A. Yes, sir, that was second hand stuff that was used there.

Q. How long had this ten inch pipe been used?

A. We had used it in a well, and probably used it to drill one well through it.

Q. How old was it?

A. I couldn't say, Mr. McDonough. We might have had it on hand as much as a year or two.

Q. You have an item of labor $561.25, that means the labor of the men who actually did the work of putting in the pipe and all other matters connected with it?

A. That represents all the direct labor charged against it.

Q. H. E. Tindle $30.00, what was that?

A. There were four men working on that job out there were burned in a fire, and their names are listed and that $30.00 is the amount we paid him for that list at $2.50 a day.

Q. Did he make a claim?

A. No, they threatened suit and that was our settlement.

Q. They threatened suit on the ground that the company was negligent some way?

A. Yes, sir.

Q. And this $30.00 paid to Tindle, Crawford, Griffin and Herring is that settlement?

A. They were based on lost time at $2.50 a day.

Q. And you charged that cost which they claimed was due to your negligence against the cost of the pipe line?

A. Yes, sir, we always do.

Mr. McDonough: I move to strike out what he said "We always do."

The Court: Very well; that will be stricken out.

Q. The next is Palace Drug Company $14.85, is that for medicine obtained for these men?

A. Yes, sir.

Q. The next is Sparks-Memorial Hospital $50.00, is that payment for service rendered those men?

A. Yes, sir.

Q. And the next is Dr. Foltz $76.00, is that for physician's services rendered these four men?

A. Yes, sir.

[fol. 165] Q. The last item is engineering charge ten per cent, did you pay any engineer, did the company pay any engineer?

A. The company has a resident engineer.

Q. I asked you if the company paid a bill for that amount?

A. No, sir; no outside engineer.

Q. Mr. Williams can you give the date when the Twin City Pipe Line Company made a contract with G. T. Cazort for his gas?

A. Yes, sir.

Q. What date was it?

A. The Twin City never made a contract with G. T. Cazort. The Industrial Oil & Gas Company did.

Q. When was that contract made?

A. 8th day of April, 1921.

Q. When was the contract closed, if there was a contract between the Twin City Pipe Line Company and Hale about the purchase and sale of the Hale gas?

A. October 25, 1923.

Q. Was that contract made with the Twin City or the Industrial Oil?

A. Both; the Twin City Pipe Line Company purchased the pipe lines and the Industrial Oil & Gas Company purchased the production that belonged to Mr. Hale and his company.

Q. What companies did Mr. Hale have at the time?

A. Clear Creek Oil & Gas Company, La Salle Oil & Gas Company, Crow Oil & Gas Company and certain properties that belonged to him and his wife on which he had drilled one well.

Q. You knew where those wells belonging to those compani-s and Mr. Hale were at the time the deal was made?

A. Yes, sir.

Q. And knew the production of them?

A. Yes, sir, approximately.

Q. After that deal was made, which was what date, did you say?

A. October 25, 1923.

Q. October 25, 1923, the Twin City began furnishing gas to the Harding Glass Company did it?

A. The Twin City had been furnishing gas to the Harding Glass Company.

Q. I am not asking you that. I want to abbreviate as much as I can. The point I am asking is this: After the Twin City and the Industrial Oil purchased the Hale gas,—

by Hale gas I mean the gas of Hale himself and all the other companies that you have named, did the Twin City go ahead and furnish gas to the Harding Glass Company at ten cents per thousand cubic?

[fol. 166] A. Yes, sir, the Twin City was the only one that ever billed Mr. Harding for any gas and it was ten cents a thousand at that time.

Q. How long was that billing kept up at that figure to the Harding Glass Company by the Twin City?

A. I don't remember the exact time but it was several months.

Q. Have you got any letters or copies of letters that [past] between you and the Harding Glass Company?

A. Yes, I can fix the date from correspondence.

Q. Well, I will ask you to look that up and be able to give the exact date.

A. No, I haven't that correspondence with me.

Q. Had your company or the Industrial Oil & Gas Company acquired all the Cazort gas prior to the time that your company purchased the Hale gas?

A. No, sir, at the time we purchased the Hale gas Mr. Hale had acquired half the Cazort gas and we had the other half and we were mutual parties to a contract which split his gas that way, when we bought him out we naturally became the owners as a whole.

Q. Did you make another contract with Cazort after that?

A. We extended that contract.

Q. When was that extension made?

A. It was a year before the other contract was to expire. The other contract was for five years, 1926 or 1925.

Q. The date when that extension was entered into you can get?

A. I remember it.

Q. Was what?

A. 20th of January, 1925.

Q. Now how long after that was it that you notified Harding Glass Company that the Twin City would raise the price of gas?

A. It was several months; just as soon as I found out that the well that Mr. Hale had drilled from which Mr. Harding had bought his gas, I wrote Mr. Harding to that effect.

Q. Have you got that letter?

A. Yes, sir, it is in the files.

Q. Have you got it in the courtroom?

A. No, sir; I can get it.

Q. I want to ask that it be produced. How many wells did the Crow Oil & Gas Company have, if any at the time the deal between the Twin City and the Hale interests was made?

A. Do you want me to separate the Crow and Hale interests?

[fol. 167] Q. No, just the Crow's?

A. I never did separate them. We bought all his properties. I can tell you how many wells were involved in the deal. I don't know many belonged to each separate company. I know that all of them belonged to the Clear Creek of the Crow, the LaSalle not being a producing company and having no well except one Mr. Hale individually owned, one well.

Q. Mr. Hale was the controller of the whole gas interest?

A. I understood Mr. Hale held the controlling stock of those companies I mentioned.

Q. They were all under his management?

A. Yes, sir.

Q. He did manage them?

A. Yes, sir.

Q. And you dealt with him?

A. Yes, sir.

Q. You didn't deal with any other stockholders or officers of his company except Mr. Hale did you?

A. No.

Q. Who is president of the Industrial Oil & Gas Company now?

A. Mr. Earnest Jacobson of Chicago.

Q. And who is president of the Twin City Pipe Line Company?

A. The same man.

Q. Who is treasurer of each of said companies?

A. Mr. R. H. Morrison of Chicago.

Q. Who is vice president of each of them, if they have a vice president?

A. Mr. H. C. Clark of Chicago.

Q. You spoke this morning of gas being brought from the so-called Gans Field, what company transports that gas?

A. Southwestern States Gas Company.

Q. Isn't it the Crow Oil & Gas Company?

A. No, sir.

Q. Isn't the contract with the bridge down here made with the Crow Oil & Gas Company?

A. Yes, sir, but it has been assigned to the Southwestern States Gas Company.

Q. Is the Crow Oil & Gas Company as a corporation or otherwise producing any gas at all now?

A. The Crow Oil & Gas Company is a non existent corporation at the present time.

Q. When did it go out of existence?

A. I don't know that. I may be stating a fact there that isn't a fact. I know we discussed several months ago sur- [fol. 168] rendering the charter and I assume it has been done. I don't know that definitely.

Q. Does the Industrial Oil & Gas Company have exactly the same officers and directors as the Twin City Pipe Line Company?

A. Yes sir.

Q. Both those companies have always had the same officers, haven't they, since both were in existence?

A. I think so.

Q. Which one was organized first?

A. Twin City Pipe Line Company.

Q. When was it organized?

A. March, 1916.

Q. And when was the Industrial Oil & Gas Company organized?

A. In March, 1919.

Q. From 1916 to 1919 the wells were drilled by the Twin City Pipe Line were they?

A. No, sir.

Q. By whom were they drilled?

A. Wildcat Oil & Gas Company.

Q. And the Wildcat Oil & Gas Company owned the pipe lines and the wells between 1916 and 1919, did it not?

A. No, sir.

Q. What company owned them?

A. The Wildcat owned the wells that were putting gas into the pipe lines of the Twin City Pipe Line Company.

Q. Did the Twin City Pipe Line Company ever produce any—I mean drill any wells at all?

A. No, sir.

Q. Is it a transportation company only?

A. Transporting and distributing.

Q. It sells gas. Who is the president of the Fort Smith Gas Company?

A. Mr. Jacobson.

Q. The same as the president of the other two?

A. Yes, sir.

Q. Does the Twin City Pipe Line Company sell any gas to the Fort Smith Gas Company?

A. Yes, sir.

Q. Is the Fort Smith Company an Arkansas corporation?

A. No, sir.

Q. Organized under the laws of what state?

A. Delaware, I believe.

Q. Does it own any pipe lines in this county?

A. Yes, sir.

[fol. 169] Q. Does it own any pipe lines in Crawford County?

A. Yes, sir.

Q. Does it own any across the bridge at Van Buren?

A. Yes, sir.

Q. How many lines are owned by the Twin City and its affiliated companies across the bridge at Van Buren?

A. Four.

Q. Is there any other line except the ones owned by these companies?

A. Yes, sir.

Q. What other lines?

A. Two lines belonging to the Fort Smith Gas Company.

Q. Does the Fort Smith Light & Traction Company or its successor own any line crossing that bridge?

A. Two.

Q. Now?

A. Yes.

Q. Are they owned by the Fort Smith Light & Traction Company?

A. Their successors, the Fort Smith Gas Company.

Q. Does the Fort Smith Gas Company and the Twin City Pipe Line Company own all the lines that cross that bridge?

A. Yes, sir.

Q. What size are the lines belonging to the Ft. Smith Gas Co.?

A. One of them is 6 and 5/8ths inside diameter and the other is six inches.

Q. What size are the lines belonging to the Twin City?

A. Three 6 inch, one 6 and 5/8ths.

Q. Any lines crossing the river there belonging to any of these companies other than the lines that are on the bridge?

A. Yes, sir, three.

Q. To what company do those lines belong?

A. Two of them belong to the Twin City Pipe Line Company and the other one belongs to the Fort Smith Light & Traction Co., or its successors, the Fort Smith Gas Company.

Q. Are the officers of the Fort Smith Gas Company exactly the same as the Twin City Pipe Line Company?

A. I couldn't tell you off-hand whether they are or not.

Q. They have the same president anyway?

A. Yes.

Q. But whether the other officers are the same you don't know?

A. I don't recall. We have about thirteen companies down there and I sometimes get confused on who are the officers.

[fol. 170] Q. Which company bought the Hale gas or made a contract for the Hale gas? I mean the last contract for the Gans Field?

A. Neither one.

Q. How does the Twin City get that gas if it never bought it?

A. It buys it from the Industrial Oil & Gas Company.

Q. Does the Industrial Oil & Gas Company own any pipe line anywhere?

A. No.

Q. Then how does the Industrial deliver that gas to the Twin City?

A. Industrial Oil & Gas Company since 1921 has obligated itself by actual practice and in fact to supply the Twin City Pipe Line Company its requirements, and at times it has to go out and buy gas and has done it on more than one occasion.

Q. Have you got the contract with you between the Industrial Oil & Gas Company and the Hale Company?

A. No, sir.

Q. Can you produce a copy of it?

A. It is in Chicago.

Q. You have seen the contract, have you?

A. Yes, sir.

Q. That contract is signed by what companies?

A. Signed by an individual and Mr. Hale as an individual. Two individuals acted in the purchase of that property, S. H. Hale and Thompson Ross.

Q. The gas in Oklahoma was not owned individually by Mr. Hale?

A. Mr. Hale acted in the deal to sell those properties over there.

Q. Do you know whether the title to those properties was in Mr. Hale or in some corporation?

A. Two corporations in which he owned all the stock.

Q. In other words, he controlled it like he controlled the companies over here?

A. Yes, sir.

Q. You saw that contract I believe you say?

A. Yes, sir.

Q. Did the two corporations that owned the wells in Oklahoma join in that contract?

A. Mr. Hale contracted with Mr. Ross to make delivery of certain properties belonging to certain corporations, which was afterwards done.

Q. Then the corporations in Oklahoma did not sign the contract?

A. My recollection it was a contract between the two individuals.

[fol. 171] Q. Was the Industrial Oil & Gas Company a party to that contract?

A. No, sir, in no way.

Q. I would like to ask you to produce a copy of that contract. You can take time to do it.

A. I don't know if that contract will be available to me in any way.

Mr. Miles: We have no objection. The contract fixes whether it was a sale for all the stock in those corporations. The contract of sale of those properties was a transfer of one hundred per cent of stock from one man to another. The corporations did not sign. Now if the court rules it is necessary to get that contract we will get it but we will have to delay the case.

The Court: The point is do you object.

Mr. Miles: We object.

The Court: On what ground do you claim you are entitled to it?

Mr. McDonough: It is on the ground that it throws light upon this transaction, our theory being that the purpose of all these deals is to secure a monop-ly of the gas.

The Court: Do you make that a defense in your answer?

Mr. McDonough: Yes, sir.

The Court: How can that be a defense to this contract?

Mr. McDonough: It is that the contract is carrying out the monop-ly and in restraint of trade and is void because against public policy. That is my theory of it. If the evidence shows, as we think it will if we can get it all, that the purpose of all these contracts is to maintain an absolute unyielding monop-ly over the gas that goes to this community, then it is in restraint of trade, this contract being a link in that chain.

The Court: The objection will be sustained.

Q. Can you state at what point the Industrial Oil & Gas Company takes possession of the gas from the Gans field?

A. Yes, sir.

Q. Where?

A. In Oklahoma just north of Moffet at a measuring station.

Q. Is the Industrial Oil & Gas Company incorporated under the laws of the State of Oklahoma?

[fol. 172] A. No, sir.

Q. Has it complied with the laws of Oklahoma authorizing a foreign corporation to do business in that state?

A. It has qualified, yes sir.

Q. When was that done?

A. A number of years ago. The Industrial Oil & Gas Company owns a little gas field over here south of Muldrow and at the time we purchased that field the Industrial was qualified to do business there.

Q. Does the Twin City Pipe Line Company now furnish any gas to domestic consumers in Fort Smith?

A. No, sir.

Q. Who are the domestic consumers furnished by, what company?

A. By the Fort Smith Gas Company.

Q. Does the Fort Smith Gas Company furnish any industrial consumers gas?

A. No, sir.

Q. Which company, if either, furnishes the electric company, the Mississippi Valley Power Company?

A. Twin City Pipe Line Company.

Q. Where is that gas delivered?

A. At the power station.

(By Mr. Brown:)

Q. Mr. Williams, what is the cost of laying pipe line, an eighth inch pipe line?

A. Over what kind of territory?

Q. Ordinary territory where the line is two or three feet below the surface of the ground?

A. You mean high pressure line or low pressure line?

Q. An 8 inch line like you used out here at the glass plant?

A. The rule of thumb average on it, and it is a fair average, around ten thousand dollars a mile.

Q. How long is that pipe line you installed between the car barn ten inch main and the Sixth Street main?

A. Right at 2800 feet.

Q. Then that cost out there then was considerably below the average cost per mile?

A. That ground out there was not very high, our labor cost was lower than if we had to dig new ground. One of the elements that enters into it is the cost of moving dirt and there we just happened to strike a place where it was cheaper to construct.

Q. Now where does the Fort Smith Gas Company get its gas, at what point is delivery made to it and by what com-
[fol. 173] pany is delivery made to it?

A. It receives its gas at five different measuring stations, one in Van Buren, four along that ten inch line inside the city limits of Fort Smith, one at what is called the car barn station, L Street station, Grand Avenue station and Henderson station.

Q. Who makes delivery of gas to the Fort Smith Gas Company?

A. Twin City Pipe Line Company.

Q. I believe you state the Fort Smith Gas Company has no industrial consumers in Fort Smith?

A. None anywhere.

Q. You stated in direct examination that this 8 inch line connecting the ten inch line on Johnson street with the eight inch line on Sixth street was of no benefit whatsoever to the gas company?

A. Except for the service to Mr. Harding.

Q. I will ask you Mr. Williams if it isn't a fact that that line—state whether or not it is a fact that that line has a tendency to equalize your pressure?

A. Well, the equalization of pressures usually would hold down the ten inch line because we carry higher pressures on that line than we do on the 8 inch, and we have to carry higher pressure because of taking care of the consumers and we don't particularly equalize the pressure which is always carried under a higher pressure than the 8 inch line.

Q. Then it has absolutely no benefit so far as equalizing pressures go?

A. No.

Q. I will ask you if you didn't state in direct examination that there were three times when one of your lines, either the 8 inch or ten inch lines were cut off absolutely, and the ten inch for a period of three weeks was cut off?

A. The period extended over three weeks.

Q. Did you derive any benefit from that 8 inch line during that period?

A. Nothing except to take care of Mr. Harding.

Q. Well, you did derive that benefit?

A. So did he. Yes, we derived benefits.

Q. Have you got a cutoff into the connecting 8 inch line to the Harding Glass Company at Sixth street?

A. Yes, sir.

Q. Do you keep it off?

A. Keep it off except when it is necessary to open it to let Mr. Harding take gas.

Q. Have you one between Johnston street and car barn?

A. Yes, there is one at the car barn shutting it off and one at the main line shutting it off.

Q. What date was it approximately that your companies bought out the Hale interests in Oklahoma?

[fol. 174] A. I don't know just to call the date of that contract. I merely saw that Contract in Chicago but was some time in the summer of 1928.

Q. Did you with Mr. W. R. Martin deliver this contract in evidence between the Harding Glass Company, purported contract between the Harding Glass Company and the Twin City Pipe Line Company to Mr. Harding's office the day it was signed?

A. Yes.

Q. Who drafted that contract?

A. Mr. Martin.

Q. Mr. W. R. Martin?

A. Yes.

Q. You stated, I believe, in direct examination that the Harding Glass Company was the only industrial consumer you had who could be served from two lines in the City of Fort Smith?

A. That is correct.

Q. Then they are getting a preference out there?

A. They are getting a preference insofar as physical connection with the lines is concerned.

Q. Well, they are getting a preference so far as gas consumption is concerned?

Mr. Daily: I think he ought to be permitted to answer.

The Court: I think the witness can make his own statement in regard to that.

A. He is getting a preference under extraordinary circumstances as far as that connection is concerned only; not to the exclusion of any other customer's service.

By Mr. McDonough:

Q. Mr. Williams, is there a pump on the ten inch line, I mean in Crawford County, is that gas pumped?

A. The ten inch line is connected at the compressor station and through the compressor station with the gas from every field in Crawford County.

Q. Then the gas that comes in in the ten inch line comes through the compressor?

A. Not entirely.

Q. Most of it does?

A. Part of it does.

Q. How about the eight inch line?

A. The eight inch line since,—well the 8 inch line previously has carried the high pressure gas from the Alma field. There was an 8 inch pipe away from the Alma into the 8 inch, a six from Alma in to the ten inch, and then the 8 inch line that you are speaking of carried part of the Alma gas on into Fort Smith.

[fol. 175] Q. The point I want to understand is whether the gas that passes through the 8 inch line, the one north of the Harding glass plant, whether that goes or comes off the force of the pressure of the wells, or whether it is aided by force of the compressor?

A. Both those lines which will operate under their regular pressure are connected to it and so are the pumped.

Q. I will withdraw that part which I asked about the size of the lines. Do you mean that the ten inch lines, and and 8 inch are con-ected in Crawford County?

A. Yes, sir.

Q. By what size pipe line?

A. That map shows all those connections. Here is the pump station here (indicating) Crawford County, Williams and Alma fields lie here and in here (indicating). All of this gas is picked up by these lines here, can be picked up, it isn't always necessary to do it. The gas in that ten inch line is lower gravity. The high pressure gas from the Alma field comes through this six inch line into the ten inch line and into that 8 inch line into Fort Smith. The ten inch is connected with every field that we have through the pumps, and directly.

Q. The 8 inch line comes down here?

A. No, sir, that is a six inch line.

Q. Is this an 8 inch line? The diameter of these lines are shown on the map?

A. Yes, sir.

Q. Is it the ordinary custom of furnishing this gas to pass this Alma gas through this compressor and into Fort Smith?

A. No, sir.

Q. You generally pass it through its own force?

A. No, we usually pass it through this line here by its own force.

Q. What do you mean by this line?

A. This is still another line. If you will notice those two lines are connected and loop around the Alma field.

Q. The 8 inch line I am now asking you about is the one which goes slightly south of west from Alma?

A. Yes, sir.

Q. Does that line go to the compressor?

A. No, sir.

Q. Then the gas that passes through that does not pass through the compressor?

A. No, sir, it can't. That line is connected with the ten inch line just outside of the old smelter grounds over at Van Buren, giving its gas into the ten inch.

Q. Your map does not show the pipe lines from these main lines to the wells themselves?

[fol. 176] A. No, this only shows the main lines.

Q. Mr. Williams, have you computed, if not, I will ask you to compute the amount of money paid to the Twin City Pipe Line Co. for gas furnished by the Twin City Pipe Line Co. at the ten cent rate. Can you do that from your books?

A. I can do it from that schedule there.

Q. I don't want to stop to do that; if you can, do it afterwards. I will call you back and let you give it. I wish you would compute also the amount paid to your company by the Harding Glass Company for gas furnished after the contract was made, this contract on which this suit is based.

Mr. Daily: I want to object to the question as to the amount of gas paid for at the ten cent rate as being incompetent, irrelevant and immaterial. That was all prior to this contract.

The Court: What is the object of that, Mr. McDonough?

Mr. McDonough: I thought it was cross-examination, because I think they went into it. The object of it is to show the facts.

The Court: I do not recall anything that was said on the direct examination about it, and I do not understand that is involved in this case.

Mr. McDonough: If they furnished a statement showing the amount of the gas and I asked them to state the cost of that, it looks to me if one is relevant the other is.

The Court: I understood this was offered for the purpose of showing the quantity of the gas rather than anything connected with its cost.

Mr. Daily: That is correct.

Mr. Brown: In response to my question a few minutes ago that this 8 inch line connected the car barn ten inch main with the Sixth Street 8 inch main was of no benefit to the Twin City Pipe Line Company you stated that when the Johnson street main was cut off during the paving of Eleventh Street there that you derived no benefit from that at all except to serve Harding. And I infer that all the consumers on that ten inch line were cut off for a period of three weeks?

A. Along that ten inch line there is only one other consumer on it.

[fol. 177] Q. What [—] Acme Brick Company. And at that time we were taking gas from Mr. Charley Orr at the south end, which took care of the Acme.

Q. Then when that line was cut off during the period of three weeks you had the 8 inch cut off between the Harding plant and where it connects into the ten inch line?

A. I don't know whether it was cut off at that time or not. I assume it was.

Q. Did you deliver any gas to the Fort Smith Gas Co. through that ten inch?

A. Not in the summer time.

Q. Was this period you speak of in the summer time?

A. Yes, sir.

Q. In the winter time do you serve any consumers at all either the Forth Smith Gas Co. or anybody else through that ten inch line other than the Acme Brick Company and Harding?

A. O yes, the Fort Smith Gas Company.

Q. At no time about which you have spoken that one or the other lines were interrupted, the Johnson street line or the Sixth street line were serving either the Ft. Smith Gas Co. or any industrial consumer?

A. Not that I recall.

Q. It has never been cut off at any other time but in the summer time?

A. Not since signing of this contract. Prior to that time, yes.

Redirect examination.

By Mr. Daily:

Q. Mr. Williams, prior to that time the regulator station you testified on direct examination, was burned down by tramps on the ten inch line?

A. Yes.

Q. At that time what was the situation with reference to all the [the] customers on the ten inch line?

A. They were all out of gas.

Q. At another time the 8 inch line went out through high water?

A. Yes.

Q. What happened to the customers on that line, do you recall?

A. They were down for a long time, the ones on the west end there.

Q. The Fort Smith Gas Company was not in existence at the time this contract was signed?

A. O no.

Q. It was the corporation that was formed to purchase the domestic distribution system formerly owned by the Fort Smith Light & Traction Company?

[fol. 178] A. Yes.

Q. The Fort Smith Light & Traction Company was in no way affiliated with either the Twin City Pipe Line Co. or the Industrial Oil and Gas Co.

A. No.

Q. Then at the time this contract was entered into the Fort Smith Light & Traction Company who took gas from the Twin City was entirely a corporation that had no interest or connection whatsoever with the plaintiffs in this case?

A. Yes, separate entirely.

Q. Mr. Brown asked you who prepared this contract in evidence and you said Mr. W. R. Martin. What position, if any, did he have with the Twin City Pipe Line Company and Industrial Oil & Gas Company?

A. He was president of both companies.

Q. At the time that contract was signed the control of the stock of both companies, that is, the controlling stock of both companies were owned by the same people?

A. Yes.

Q. But they did not have an identity of stockholders?

A. No, there was some stockholders in the Industrial which did not have any in the Twin City.

Q. And one rather large stockholder?

A. Mr. J. M. Wear.

Q. And he was a director in the Twin City but not in the Industrial?

A. Yes.

Q. At the present time what is the situation with reference to the ownership of the stock of Industrial Oil & Gas Co. and the transportation company?

A. It is all owned by the same company.

Q. You made a statement in answer to Mr. McDonough on cross-examination about the ten inch line crossing the free bridge. That isn't quite correct, is it?

A. I described that connection this morning. It splits at the north side of the river, it then converges into the ten inch on this side of the river.

Q. As a matter of fact, I may not understand this exactly, but as I understand your situation with reference to the gas wells in the field, all of them are so attached to pipe lines that interconnect that all of them that have sufficient pressure can either send their gas through their own pressure without use of a compressor, or all of them can be turned into the compressor if they get low enough?

A. That is true.

Q. So you can use them either way, whichever can give the most advantageous service?

A. That is true.

[fol. 179] Q. Can they all be sent through the eight inch line instead of the compressor, or the ten inch line instead of the compressor?

A. Yes, when we made this connection here for Mr. Harding we made connection here so we could supplement the pressure either way.

Q. You mean where?

A. Across the river.

Q. Is that Circle No. 2?

A. Yes.

Q. With reference to the gas wells Mr. McDonough cross-examined you down to a certain point, but as I understood you beginning with the Ross Well which was completed on

October 3, 1926 he did not ask you anything about whether they were producers. That is those wells which were located in Sections 15 and 22, Township 9, Range 31, are some of those wells producers?

A. Six of them.

Q. With a maximum of what?

A. Seven million open flow down to two million. The smallest one is two million.

Q. Are those the wells that are in the Shibley area?

A. Yes, sir.

Q. Is that a new field?

A. Yes.

Q. How much gas have you ever had to draw out of that field?

A. Approximately fifty million, I guess.

Q. During last winter?

A. Since it was brought in in 1926.

Q. Well, was all of it taken out last winter?

A. Yes, the pipe line was completed through there last year.

Q. Mr. McDonough asked you if that wasn't adjacent to the pipe lines?

A. This pipe line here now the one that Mr. McDonough referred to, the one going straight to Ft. Smith has been taken up down to here (indicating) and put up and relaid straight to that field there to the corner of that section.

Q. The point I am getting at is when this contract was signed did you have any gas in sections 15 and 22?

A. We did not have any leases there. It was all brought in since the time in 1926.

Cross-examination.

By Mr. McDonough:

Q. This 8 inch line that you say originally came down, but now that pipe line runs in a southwesterly direction?

A. Directly across section 22 passing close to the center.

[fol. 180] That is an 8 inch line?

A. Yes, sir.

Q. That gas does not go through the compressor?

A. No, sir, that is high pressure gas.

Q. Now then coming to the Harding glass plant, if anything happens to the ten inch line between the river and the Harding glass plant, if it is put out of commission there the gas can be brought on the 8 inch line around through that line and around through this line running by the Harding Glass Company?

A. No, sir; at the present time the only valve we have on the ten inch is on Division Street. If anything should happen here it would throw this whole thing open.

Q. Haven't you a valve so that you can cut this off where the ten inch?

A. No.

Q. Then if anything should happen to the pipe line, or this 8 inch pipe line there could you not run gas down this way (indicating) and come across here (indicating) and furnish these people down here?

A. It could be done, yes. It never has been necessary.

Mr. Daily: We offer in evidence a certified copy of the certificate of incorporation of the Citizens Pipe Line Company, and it shows who the officers are.

Mr. Brown: We want to object to it on the ground that it is irrelevant and immaterial and has no bearing on the issues in this case.

The Court: Objection is overruled.

Mr. Brown: Exception.

Said articles of incorporation being in words and figures as follows:

PLAINTIFF'S EXHIBIT 8

Certificate of Incorporation of Citizens Pipe Line Company

Pursuant to the provisions of Act 250 of the Acts of the General Assembly of the State of Arkansas for the year 1927, being an act entitled "An Act to Provide for the formation Corporations, the Regulation of Corporations, and for other Purposes," the undersigned, C. H. Harding, [fol. 181] W. E. Harding, B. B. Johnston, W. L. Hinton. W. A. Spear, A. J. Burke, E. W. Young, being the subscribers to the capital stock hereinafter named, hereby certify as follows:

First. The name of this Corporation is Citizens Pipe Line Company.

Second. The nature of the business, or objects or purposes proposed to be transacted, promoted or carried on are:

To acquire, construct, own, hold, demise, and dispose of pipe lines for the transportation of oil, and natural or artificial gas.

To develop or manufacture, transport, market, buy, sell, and deal in petroleum or any of its products, natural and artificial gas.

To acquire, own, hold, demise, and dispose of real estate.

To purchase, construct, own demise, and sell all kinds of houses, buildings or structures.

To purchase, acquire, drill, own, hold, demise, and dispose of oil and gas leases, lands, wells, pipe lines, plants, and systems, and to buy and sell oil and natural or artificial gas.

To acquire, operate, own, hold, and dispose of coal mines, and gas producing plants.

To own, operate, and dispose of railways, rolling stock, steamboats, barges, automobiles truck lines, and other means of transportation, for the transportation of other products manufactured or dealt in by the company.

To acquire, own, hold, and dispose of the corporate stock and securities of other corporations, and to guarantee and underwright the obligations of securities of other stocks and corporations.

To do and perform all matters and things incident or necessary for the carrying out of and of the powers herein specificially conferred.

Third. The total amount of the authorized capital stock of this corporation is $100,000.00 of which 10000 shares, having a par value of $100.00 per share is (Common stock representing $100,000.00).

[fol. 182] Fourth. The amount of capital with which this corporation shall begin business is $700.00 (not less than Three Hundred Dollars).

Fifth. The period of existence of this corporation is 99 years (not to exceed Ninety-nine years).

Sixth. The principal place of business of this corporation in the State of Arkansas is located at 512 So. 9th Street, City of Fort Smith and County of Sebastian.

Seventh. The affairs and business of this corporation shall be controlled and conducted by a Board of Directors consisting of seven members (Not less than three).

Eighth. The name and postoffice addresses of the first Board of Directors who, subject to the provisions of this Certificate of Incorporation and the Bylaws, shall hold office for the first year of the corporation's existence, or until their successors are elected and qualified, are as follows:

Name	Address	Post Office
C. H. Harding	801 So. 24 Street	Fort Smith Arkansas
W. E. Harding	1000 South Greenwood	" " "
B. B. Johnston	323 Lecta Avenue	" " "
W. L. Hinton	— Adelaide Avenue	" " "
W. A. Spear	— Harding Glass Co	" " "
A. J. Burke	605 So. 22nd St	" " "
E. W. Young	Fort Smith Bakery	" " "

Ninth. The names and post office addresses of the subscribers to this Certificate of Incorporation and the number of shares of stock which each agrees to take is as follows:

Name	Address	No. of shares
C. H. Harding	801 So. 24 Street	1
W. E. Harding	1000 South Greenwood	1
B. B. Johnston	323 Lecta Avenue	1
W. L. Hinton	— Adelaide Avenue	1
W. A. Spear	— Harding Glass Co	1
A. J. Burke	605 So. 22nd St	1
E. W. Young	Fort Smith Bakery	1

We, the undersigned, hereby declare and certify that the facts herein stated are true, and do respectively agree to take the numbers of shares of stock hereinabove set forth, and accordingly have hereunto set our hands on this 4th day of June, A. D., 1928.

C. H. Harding, 1 share; W. E. Harding, 1 share; [fol. 183] Ben B. Johnston, 1 share; Walter Hinton, 1 share; W. A. Spear, 1 share; A. J. Burke, 1 shares; E. W. Young, 1 share.

Now, therefore, we, the President, and a majority of the Board of Directors of said corporation, have caused the

said Certificate of Incorporation to be filed in the office of the County Clerk of —— County, and in the office of the Secretary of State.

In testimony whereof, we have hereunto set our hands on this — day of ——, A. D. 19—.

C. H. Harding, President. Ben B. Johnston, Secretary. C. H. Harding, W. E. Harding, Ben B. Johnston, Walter Hinton, Directors. A. J. Burke, E. W. Young, William A. Spear, Directors.

STATE OF ARKANSAS,
County of Sebastian, ss:

Be it remembered that on this 9th day of June, A. D. 1928 personally came before me, the undersigned, a Notary Public within and for the State and County aforesaid, C. H. Harding, W. E. Harding, Ben B. Johnston, Walter L. Hinton, William A. Spear, A. J. Burke, and E. W. Young, parties to the foregoing Certificate of Incorporation, known to me personally to be such, and severally acknowledged the said Certificate to be the act and deed of the signers respectively and that the facts therein stated are truly set forth.

Given under my hand and seal of office the day and year aforesaid,

R. H. Jackson, Notary Public. My commission expires August 1st, 1930. (Seal.)

Certificate of Record

STATE OF ARKANSAS,
County of Sebastian, ss:

I, Earl Dawson, Clerk of the County and Probate Courts of said County, in the State aforesaid, do hereby certify that the foregoing instrument of writing was filed for [fol. 184] record in my office on the 9th day of June and the same is now duly recorded in Record Book, Vol. L, Page 303.

In testimony whereof I have hereunto set my hand and affixed the Seal of said Court this 9th day of June, 1928.

Earl Dawson, County Clerk.

Certificate

STATE OF ARKANSAS,
County of Sebastian, ss:

Fort Smith District, ss:

I, Earl Dawson, Clerk of the County Court in and for the County and State aforesaid, do hereby certify that the annexed and foregoing copy is a true and perfect copy of the Certificate of Incorporation of the Citizens Pipe Line Company, as the same appears on the records and files now in this office at page 303 record book "L".

Witness my hand and seal of said court on this 29th day of April, 1929.

Earl Dawson, County Clerk.

Mr. Daily: We offer in evidence a certified copy of the pleadings and the decree and mandate of the Supreme Court of Arkansas in the case of Twin City Pipe Line Company vs. Citizens Pipe Line Co. and the City of Fort Smith.

Mr. Brown: The same objection.

The Court: That will be admitted subject to the objection to be ruled on hereafter.

Said pleadings and decree and mandate of the Supreme Court of Arkansas being in words and figures as follows:

PLAINTIFF'S EXHIBIT 9

IN THE SEBASTIAN CHANCERY COURT, FORT SMITH DISTRICT

TWIN CITY PIPE LINE COMPANY, Plaintiff,

vs.

CITIZENS PIPE LINE COMPANY, CITY OF FORT SMITH, J. H. Parker, Mayor; M. J. Miller, Commissioner No. 1, and W. H. Vaughn, Commissioner No. 2, Defendants

COMPLAINT—Filed Aug. 15, 1928

Comes the plaintiff, Twin City Pipe Line Company, and for its cause of action against the Citizens Pipe Line Com-

[fol. 185] pany, City of Fort Smith, J. H. Parker, Mayor, M. J. Miller, Commissioner No. 1, and W. H. Vaughn, Commissioner No. 2, defendants, alleges:

That the plaintiff is a corporation organized and doing business under the laws of the State of Arkansas; that its principal place of business is located in the City of Fort Smith, Arkansas, and that it is a tax payer in the City of Fort Smith; and owns property on north Sixth Street in the said City of Fort Smith;

That on the 16th day of May, 1928, the City Commission of Fort Smith passed Ordinance No. 1505, a copy of which is attached to this complaint marked Exhibit "A", purporting to grant a gas franchise to the defendant, Citizens Pipe Line Company; that at the time of the passage of said Ordinance there was no such corporation in existence as the Citizens Pipe Line Company; that by the terms of said ordinance it was required that the Citizens Pipe Line Company accept the grant of a franchise within thirty days after the ordinance became effective; that an acceptance was filed by *on* C. H. Harding and Ben B. Johnston, but that the name of the Citizens Pipe Line Company was not signed to said acceptance, and that the time said acceptance was filed, to-wit on the 28th day of May, 1928, no such corporation as the Citizens Pipe Line Company was in existence.

The plaintiff says that it is, in addition to being a tax payer, a public utility operating under a franchise in the City of Fort Smith for the sale of natural gas for industrial purposes only; and that it is limited by its franchise to the rate of 15c per thousand cubic feet, and that it is required to pay to the City of Fort Smith, by terms of its franchise and contract as a consideration for the use of the streets and alleys of Fort Smith, 2% of its gross revenues from the sale of gas.

Plaintiff says that after the passage of said ordinance No. 1505 attached hereto, certain parties got together, and formed a public utility corporation for the purpose of owning pipe lines and for the purpose of selling natural gas; that the City Commission was led to believe that the purpose of this ordinance and franchise was solely to sell natural gas to the Harding Glass Company, but that nothing in the ordinance attached to this complaint limits the sale of gas to said Harding Glass Company; that the City At-

torneys acting for the City at that time advised certain members of the City Commission that this ordinance was a grant of a franchise and that under the terms of said ordinance the Citizens Pipe Line Company could sell gas [fol. 186] wherever it pleased along the route set out in said ordinance, the City Attorneys and the City Commission at that time believing that there was such a corporation as the Citizens Pipe Line Company, and that the passage of the ordinance granting a franchise to the Citizens Pipe Line Company, at the time when there was no such corporation in existence and no corporation legally bound to accept the terms of the ordinance, was fraud upon the City of Fort Smith.

Further the plaintiff says that there was absolutely no consideration passing to the City of Fort Smith for the passage of said ordinance; that there is no limit placed in said ordinance in the price at which gas may be sold; that there is no limit in time for the use of said streets, and that by said ordinance the perpetual use of said streets is granted to the Citizens Pipe Line Company for the use of a pipe line; that such grant of a perpetual use of the streets without any consideration whatever is such an unreasonable and oppressive grant as to transcend the authority of the City Commission of Fort Smith.

The plaintiff, therefore, alleges that the ordinance is void:

First, because it was granted to a purported corporation not in existence at the time, and the acceptance of the grant was filed by people who purported to be President and Secretary of the corporation, when such a corporation was not in existence, and there was no binding contract.

Second, because the City Commission was led to believe at the time that the ordinance was passed that it was the Harding Glass Company transporting its own gas through the streets of Fort Smith for its own use, and that no grant of a franchise to a public utility was intended, when in effect the ordinance is a grant to a pipe line company to use the streets and alleys of Fort Smith to sell gas, and is, therefore, a fraud upon the City Commission of Fort Smith, and should be declared void.

Third, there is no consideration whatever for the grant of the use of the streets, there being no limit in price fixed at which the said utility might sell gas from its said pipe line and no express grant that prohibits it from selling gas generally.

Fourth, a corporation called the "Citizens Pipe Line Company" was formed, which is in fact authorized by its character to own and control pipe lines for natural gas and [fol. 187] to sell natural gas, and such corporation is now attempting to use the streets of Fort Smith pursuant to said void grant.

Fifth, the grant by said ordinance No. 1505 to the use of the streets is not limited in time, and is a perpetual grant to the use of the streets and alleys in Fort Smith.

Sixth, the plaintiff is required by its franchise to pay the City 2% on all sales of natural gas, and all other franchises granted by the City of Fort Smith, notably one recently to the Border Gas Company, has the same requirement for the payment of 2% on all gross sales of industrial gas.

This public utility, the Citizens Pipe Line Company, by using this franchise, which was secured by representing to the City that it was the Harding Glass Company transporting its own gas, has successfully, if the ordinance be held valid, avoided the payment of said 2% of sales of gas for industrial purposes, thereby perpetrating a fraud on the City of Fort Smith.

Plaintiff brings this suit both as a public utility operating in Fort Smith and as a tax payer of Fort Smith on behalf of itself and other tax payers, and as an owner of property on Sixth Street, one of the streets which it is contemplated by the terms of Ordinance No. 1505 will be occupied and used by the laying of said gas line.

Wherefore the plaintiff alleges, for the above reasons that said ordinance is oppresisve, unreasonable, unjust and arbitrary, that it is a fraud upon the rights of the tax payers of Fort Smith, and plaintiff prays that the Citizens Pipe Line Company, a corporation so formed since the passage and acceptance of such ordinance and which is now

attempting to occupy the streets under said ordinance, be enjoined from operating and acting under the grant in Ordinance No. 1505, and so far as said City of Fort Smith is concerned that said Ordinance be declared void.

Twin City Pipe Line Company, by Pryor, Miles & Pryor, Attorneys.

Duly sworn to by A. G. Williams, Jr. Jurat omitted in printing.

[fol. 188] EXHIBIT "A" TO COMPLAINT

Ordinance No. 1505

Ordinance Granting to the Citizens Pipe Line Company the Privilege and Right to Construct, Lay, Own and Operate a Pipe Line under Certain Streets in the City of Fort Smith, Arkansas

Be it ordained by the City Commission of the City of Fort Smith:

Be it ordained by the People of the City of Fort Smith:

Section 1. The Citizens Pipe Line Company is hereby granted the right and privilege to construct, lay, own and operate a six (6) inch gas pipe line from a point in Johnson Street, which point is at or near the Southwest corner of a tract of land owned by Maggie Walker, and running thence under and along said Johnson Street to its intersection with North Sixth Street, and thence across North Sixth Street under and to Kelley Highway, and thence along and under Kelley Highway to a point opposite the present Harding Glass plant and thence to the Harding Glass Plant.

Section 2. That said Citizens Pipe Line Company is authorized to construct and operate said gas pipe line and to transport through said pipe line gas for consumption and use at the Harding Glass Plant.

Section 3. The said Citizens Pipe Line Company shall be required to keep said pipe line in proper condition and protect the *the* citizens and the city from any damage or injury due to the operation of said gas pipe line; and shall replace paving in streets where pipe line laid in as good

condition as it was before the said pipe line was laid; and shall keep ditches, alleys and streets where pipe line laid properly filled.

[fol. 189] Section 4. The said Citizens Pipe Line Company shall accept this grant and permission in writing within thirty (30) days after this ordinance becomes effective.

Section 5. This Ordinance shall become effective from and after its pasasge and publication.

Approved and adopted this 16th day of May, 1928.

J. H. Parker, Mayor.

Attest: Earl Henderson, City Clerk.

[File endorsement omitted.]

IN THE SEBASTIAN CHANCERY COURT, FORT SMITH DISTRICT

No. 7237

TWIN CITY PIPE LINE COMPANY, Plaintiff,

vs.

CITIZENS PIPE LINE COMPANY, CITY OF FORT SMITH, J. H. Parker, Mayor; M. J. Miller, Commissioner No. 1, and W. H. Vaughn, Commissioner No. 2, Defendants

ANSWER AND DEMURRER OF CITIZENS PIPE LINE COMPANY—Filed Sept. 13, 1928

Comes the defendant, the Citizens Pipe Line Company, a corporation, and without waiving its demurrer herein, but insisting on the same, answers as follows:

1. This defendant denies that this suit has been brought by the Twin City Pipe Line Company, a corporation.

Further answering, this defendant has not sufficient information from which to form a belief as to whether the original corporation known as the Twin City Pipe Line Company is doing business under the laws of the State of Arkansas, and as to whether its principal place of business is located in the City of Fort Smith, Arkansas, and

as to whether it is a tax payer in the City of Fort Smith, and as to whether it own property on North Sixth Street in said City of Fort Smith.

2. This defendant denies that it had no existence at the time of the passage of Ordinance No. 1505, and alleges that at and before that time this defendant was a corporation in fact and of right, and denies that said ordinance was passed before this corporation was in fact organized.

[fol. 190] 3. This defendant denies that the ordinance was passed before this defendant was a corporation in fact, and denies that this defendant failed to accept the terms of said ordinance within the thirty (30) days provided in the same, and denies that the acceptance of this defendant was filed solely and alone by C. H. Harding and Ben B. Johnston, and alleges that C. H. Harding and Ben J. Johnston were the officers of this defendant and were duly authorized by the Board of Directors of this defendant to accept said ordinance, and said ordinance was accepted within the time allowed by this defendant through its officers acting for it and in its behalf, and denies that "on the 28th day of May 1928, no such corporation as the Citizens Pipe Line Company was in existence."

4. This defendant denies that the plaintiff is a tax payer and denies that it is a public utility operating under a franchise in the City of Fort Smith for the sale of natural gas for industrial purposes, and denies that it is required to pay to the City of Fort Smith two per cent of its gross revenues for the use of the streets in the City of Fort Smith.

5. Further answering, this defendant denies that after the passage of said ordinance No. 1505 certain parties got together and formed a public utility corporation for the purpose of owning pipe lines and for the purpose of selling natural gas, and alleges that said corporation was organized prior to the passage of said Ordinance.

6. Further answering, this defendant denies that the City Commission was misled in any way, and denies that said ordinance grants to this defendant the right to transport and sell gas in the City of Fort Smith to any consumer other than the Harding Glass Company, and alleges that said Ordinance in Section 2 thereof plainly and expressly limits the sale of gas to the Harding Glass Company. Said

Section 2 is in the following language: "The said Citizens Pipe Line Company is authorized to construct and operate said gas pipe line and to transport through said pipe line gas for consumption and use in the Harding Glass Plant.

7. Further answering, this defendant denies that the City Attorneys, acting for the City at that time, advised certained members of the City Commission that this ordinance was a grant of a franchise, and alleges that the City Attorneys who were then acting purport to be the attorneys of the plaintiff in bringing this suit, and that as said attorneys were the attorneys of the City at that time, and as said [fol. 191] attorneys now purport to be the attorneys of the Twin City Pipe Line Company, said attorneys and the Twin City Pipe Line Company are now estopped from bringing and maintaining this suit.

8. This defendant denies that it has power under said ordinance to sell gas wherever it pleases along its route in the City of Fort Smith.

9. Further answering, this defendant alleges that the City Attorneys and the City Commission at the time of the passage of said ordinance knew all the facts and knew that said ordinance did not grant to this defendant any right to sell gas to any consumer except the Harding Glass Company.

10. The defendant, further answering, denies that said ordinance was passed at a time when there was no such corporation this defendant in existence, and alleges that this defendant was in existence at the time as a corporation in fact, and alleges that the representatives of this defendant, duly authorized by this Board of Directors, duly accepted said ordinance and this defendant is legally bound there by, and the said ordinance has become and is now a contract between the City of Fort Smith and this defendant.

11. This defendant denies that there was any misapprehension or misunderstanding of any fact, and denies that there was any fraud committed by the Directors of this defendant upon the City of Fort Smith, its City Attorneys or anyone else, and alleges that said ordinance was granted after publication in the newspapers that the same would

be considered and after due notice to everybody in interest that the application would be made, and after the stockholders of this defendant had organized and elected this Board of Directors, and after the Directors had elected their officers.

12. Further answering, this defendant denies that the ordinance was passed without consideration, and denies that the plaintiff can raise that question, and denies that any consideration is necessary, and alleges that there was a good and valuable consideration, and alleges that there was a limit where this defendant could sell gas, and alleges that it was limited solely to the sale of gas to the Harding Glass Company, and alleges that it has no intention of selling gas to any other concern.

13. Further answering, this defendant denies that the grant of perpetual use of the streets, such as that given to [fol. 192] this defendant, is without consideration, and denies that it is unreasonable and oppressive, and that it transcends the authority of the City Commission of the City of Fort Smith.

14. Further answering, this defendant denies that the ordinance is void.

15. This defendant denies that the ordinance is void because granted to a purported corporation not in existence, and denies that the acceptance was filed by people without authority from this defendant, and alleges that the acceptance was for the use and benefit of this defendant and was by this defendant, and alleges that said ordinance is a binding contract between this defendant and the City of Fort Smith.

16. This defendant admits that the City Commission was led to believe at the time that the ordinance was passed in order that gas might be transported by this defendant and sold and delivered solely and alone to the Harding Glass Company, and alleges that the true facts were made known to the City Commission and to the public generally at the time, and that the owners of a majority of the stock of this defendant are stockholders in the Harding Glass Company, and that the Harding Glass Company, through its stockholders uniting with other persons, organized this

defendant and developed through other corporations a valuable gas field north of the river and the Harding Glass Company and this defendant have cooperated for the purpose of getting a supply of gas in order that the Harding Glass Company might not be compelled to remove its plant from the City of Fort Smith to some other city because of the high price of gas threatened to be charged by the people managing the above Twin City Pipe Line Company, and that the Harding Glass Company, in order to be able to stay in the City of Fort Smith, felt it necessary to invest money and secure a supply of gas, which it has done from this defendant and other corporations in which the Harding Glass Company took an interest, and that the purpose of securing that gas was to give the Harding Glass Company a supply of gas to enable it to operate its plant in the City of Fort Smith.

17. This defendant denies that the ordinance in question is a general grant of a franchise to this defendant as a public utility, and denies that any such grant was asked for by this defendant, and that any such grant was given, and denies that the ordinance is in effect a grant to a Pipe Line [fol. 193] Company to use the Streets and alleys of Fort Smith to sell gas generally, and therefore, denies that the granting of said ordinance, is a fraud upon the City Commission, and denies that the same should be declared void, and alleges that the said ordinance, being a contract valid and binding, cannot be declared void because the same is in full force and effect, and to declare it void would be to impair the obligation of a contract between this defendant and the City of Fort Smith, in violation of this defendant's rights as guaranteed by Section 10 of Article I of the Constitution of the United States.

18. This defendant denies that the granting of said ordinance was without consideration, and alleges that the same was upon a good and valuable consideration and that this defendant has expended large sums of money in the construction of said pipe line and the purchase of the pipe, and in making preparations to deliver the gas to the Harding Glass Company, and denies that said ordinance grants to this defendant any franchise to sell gas generally in the City of Fort Smith.

19. This defendant denies that it is attempting to use any of the streets of the City of Fort Smith under a void grant, and alleges that because of the interest of the Harding Glass Company in this defendant as a stockholder, this defendant and the Harding Glass Company have a right under the laws of the State of Arkansas to develop gas and transport the same into the City of Fort Smith for the consumption and use by the Harding Glass Company.

20. This defendant denies that said ordinance is illegal or void because not limited in time, and it does not purport to be on its face a perpetual grant.

21. This defendant denies that this ordinance is in any manner for the general purposes such as that was granted to the Border Gas Company, and this defendant, upon information and belief, alleges that control of the Border Gas Company has been secured by persons who purport to be in control of the Twin City Pipe Line Company, and that the acquisition of said Border City Gas Company was to enable the persons who control the Twin City Pipe Line Company to secure and obtain a complete monopoly of all gas in and about the City of Fort Smith.

22. This defendant denies that there is any intention to sell gas under said ordinance to anyone except to the [fol. 194] Harding Glass Company, and denies that the ordinance gives the right to this defendant to sell gas to anyone except the Harding Glass Company, and alleges that the Harding Glass Company, by reason of its owning a majority of the stock in this defendant, has the absolute right to ask that said ordinance be granted and to transport gas by means of this defendant to the Harding Glass Company plant for use in order to protect the investment of the Harding Glass Company and in order to enable that company to remain with its business in the City of Fort Smith, and denies that any fraud was perpetrated by this defendant or anyone representing this defendant, or the City of Fort Smith, or anyone else.

23. This defendant denies that the plaintiff brings this suit as a public utility operating in the City of Fort Smith and as a taxpayer of the City of Fort Smith, and alleges that the true and actual purpose of this suit is to harass

and injure the Harding Glass Company in its business, and to secure a complete monoply of all gas furnished in the City of Fort Smith, in violation of the laws of the State of Arkansas.

24. Further answering, this defendant alleges that the plaintiff is estopped from bringing and maintaining this suit for the reason that plaintiff and the plaintiff's attorneys should have brought this suit through the City Attorneys at the time that the ordinance was granted, and alleges that they then had full knowledge of the actual nature of said ordinance, and they took no steps to inform the City Commission of any invalidity in said ordinance, and by their conduct they led this defendant to believe that said ordinance was valid, and by reason of that conduct this defendant expended large sums of money in purchasing pipe and in laying the same, and in otherwise carrying out the obligations imposed upon it by said ordinance. This defendant expended said sums of money relying upon the belief that said ordinance was valid, and this defendant had a right to rely upon that belief for the reason that the attorneys who now bring this suit were then the City Attorneys, and said attorneys gave no information whatever and gave no notice whatever that there was any invalidity in said ordinance. By reason thereof the City Attorneys and the plaintiff are estopped from maintaining and prosecuting this suit.

25. The defendant further states that the plaintiff is not authorized by the State of Arkansas to question the existence of the defendant as a corporation, and that the [fol. 195] State of Arkansas only has power to question the existence of this defendant as a corporation, and that no taxpayer or a public utility in the City of Fort Smith, or elsewhere, has any right or power to question the existence of this defendant as a corporation.

26. Further answering and as a demurrer to the complaint, this defendant states that said complaint does not state facts sufficient to state a cause of action against this defendant.

P. Premises considered, this defendant prays in the alternative that this cause be dismissed, and that if the Court

should be of the opinion that the cause should not be dismissed, then that said cause be transferred to a Court of law.

James B. McDonough, Jr., Ben Cravens, James B. McDonough, Attorneys for Citizens Pipe Line Company.

[File endorsement omitted.]

Reversals Chancery Districts

STATE OF ARKANSAS, sct

IN THE SUPREME COURT

Be it remembered that at a term of the Supreme Court of the State of Arkansas, begun and held at the Courthouse, in the City of Little Rock, on the 28th day, being the fourth Monday of May A. D. 1928, amongst others, were the following proceedings, to-wit: On the 12th day of November, A. D. 1928, a day of said term:

CITIZENS PIPE LINE COM. et al., Appellant-,

vs.

TWIN CITY PIPE LINE COMPANY, Appellee

Appeal from Sebastian Chancery Court, Fort Smith District

(Decree)

This cause came on to be heard upon the transcript of the record of the Chancery Court of Sebastian County, Fort Smith District, and was argued by solicitors; on consideration whereof it is the opinion of the Court that there is [fol. 196] error in the proceedings and decree of said Chancery Court in this cause, in this: The Court erred in holding the ordinance to be void, and in enjoining the appellants from proceeding with the construction of the pipe line under the permission granted by the City authorizing it to be done.

It is therefore ordered and decreed by the Court that the decree of said Chancery Court in this cause rendered, be, and the same is hereby, for the error aforesaid, reversed, annulled and set aside with costs; and that this cause be remanded to said Chancery Court with directions to dismiss the complaint for want of equity, and for such further proceedings as may be necessary and in accordance with the principles of equity, and not inconsistent with the opinion herein delivered.

It is further ordered and decreed that said appellants recover of said appellee all their costs in this Court in this cause expended, and have execution thereof.

In testimony that the above is a true copy of the decree of said Supreme Court, rendered in the case therein stated, I, W. P. Sadler, Clerk of the said Supreme Court, hereunto set my hand and affix the seal of said Supreme Court, at my office in the City of Little Rock, this 29th day of January, 1929.

W. P. Sadler, Clerk, by J. H. Campbell, D. C. (Seal.)

IN THE SUPREME COURT OF ARKANSAS

No. 250

CITIZENS PIPE LINE COMPANY

vs.

TWIN CITY PIPE LINE COMPANY

OPINION—November 12, 1928

Statement by the Court

Appellee, a public service of utility corporation, operating under two franchises, neither of them granting the exclusive right, supplying gas to domestic consumers and industrial plants in the City of Fort Smith, brought this suit to enjoin the appellant company from constructing a pipe line from the city limits and supplying gas to the Harding Glass Company under ordinance of the City No. 1505. [fol. 197] Adopted on the 16th day of May, 1928, permitting

it to do so. A copy of the ordinance was attached to the complaint as an exhibit.

The complaint alleges that the suit is brought as a taxpayer and also as an owner of property on one of the streets crossed by the route of the proposed pipe line. That at the time of the passage of the ordinance there was no such corporation in existence as the Citizens Pipe Line Company; that by the terms of the ordinance said company was bound to accept the grant of the franchise within 30 days after the ordinance became effective; that an acceptance was filed by one C. H. Harding, and Ben B. Johnson as president and Secretary but the Citizens Pipe Line Company's name was not signed thereto nor was any such corporation in existence on the 28th day of May, 1928, the day of its acceptance. That appellee was operating a public utility under a franchise in the City of Fort Smith for the sale of natural gas for industrial purposes only, and limited by its franchise to a rate of 15¢ per thousand cubic feet and are required to pay the City of Fort Smith for the use of its streets and alleys 2% on its gross revenue of the sale of gas.

No. 250-2

1. "That the City Commissioner was led to believe that the purpose of this ordinance and franchise was solely to sell natural gas to the Harding Glass Company."

2. "That nothing in the ordinance attached to this complaint limits the sale of gas to said Harding Glass Company."

3. "That no grant of a franchise to a public utility was intended, when in effect the ordinance is a grant to a pipe line company to use the streets and alleys of Fort Smith to sell gas, and is, therefore, a fraud upon the City Commission of Fort Smith."

4. "That the city attorneys acting for the City at that time advised certain members of the City Commissioner that this ordinance was a grant of a franchise and that under the terms of said ordinance the Citizens Pipe Line Company could sell gas wherever it pleased along the route set out in said ordinance."

5. "That by said ordinance the perpetual use of said streets is granted to the Citizens Pipe Line Company for the use of a pipe line."

6. "That the grant by said ordinance N. 1505 to the use of the streets is not limited in time, and is a perpetual grant [fol. 198] to the use of the streets and alleys in Fort Smith."

A demurrer was filed on August 27, 1928, by the Citizens Pipe Line Company and adopted by appellant, the City of Fort Smith. It charges that the complaint does state facts sufficient to constitute a cause of action against either or any of the defendants; does not show authority or right in the plaintiffs to bring or maintain the suit; that it shows the appellant company was a corporation in fact and plaintiff was without right to question its existence as such at the time the ordinance was granted, and did not state facts sufficient to show an equitable cause of action. The demurrer being overruled and exceptions saved the Citizens Company answered, without waiving its demurrer, denying that it was without existence at the time of the passage of the ordinance and alleging that before that time it was a corporation in fact and denied that the ordinance was passed before it was in fact organized. Denied that it failed to accept the terms of the ordinance within 30 days and that its acceptance was filed solely by C. H. Harding and Ben B. Johnson, and alleged that Harding and Johnson were the officers of the defendant, duly authorized by the board of directors of the corporaiton to accept the ordinance and did accept it within the time allowed through its officers acting in its behalf; denied that the City Commissioner was misled in any way and that the ordinance authorized the corporation to sell gas to any consumer other than the Harding Glass Company, as expressly limited in Section 2 thereof. Also denied that authority was given it by the ordinance to sell gas where it pleased along its line of pipe in the City. Denied that the ordinance was void for any reason.

Alleged that the ordinance was accepted by the defendant for its use and benefit and became a bind contract between it and the City of Fort Smith, and also denied that the ordinance was a general grant of a franchise to the defendant as a public utility and that any such grant was

asked for or given. Denied any intention to sell gas under the ordinance to any one except the Harding Glass Company or any right to do so under its terms and alleged that the Glass Company owned a majority of the stock in the defendant company and had the right to ask the passage of the ordinance to allow it to transport gas by defendant company to its plant, etc. Denied also the right of appellee to question its corporate existence.

The testimony showed the ordinance granting the franchise to W. J. Echols for construction and operation of a [fol. 199] plant for furnishing gas to consumers in the City of Fort Smith and its assignment to the appellee company, and also the ordinance granting a franchise to the Border Gas Company, the minutes of the City Commissioner showing the passage of the ordinance 1505 on May 16, 1928. The title to the ordinance shows the granting to the Citizens Pipe Line Company "the privilege and right to construct and operate a pipe line under certain streets in the City of Fort Smith." Section 1 grants to it "the right and privilege to construct, lay, own and operate a six inch gas pipe line" from a designated point in Johnson street under and along that street to its intersection with North Sixth Street and across North Sixth Street to Kelley Highway and along and under Kelley Highway to a point opposite the present Harding Glass Company and thence to the Harding Glass plant. Section 2 provides: "The said Citizens Pipe Line Company is authorized to construct and operate said gas pipe line to transport through said pipe line, gas for consumption and use at the Harding Glass Plant." Section 3 requires the pipe line company to keep its line in proper condition and protect the city from any damage and injury from its operation and to replace the paving in the streets in good condition as before the pipe line was laid and to keep the ditches, alleys, and streets along which the pipe line was laid properly filled. By section 4 the company is required "to accept this grant or permission in writing within 30 days after the ordinance becomes effective" and that it shall become effective from and after its passage and publication.

The letter acceptance of the ordinance was as follows:

"To the Honorable Mayor and Commissioners of the City of Fort Smith.

GENTLEMEN: In harmony with your action in passing the ordinance for the laying of a pipe line by the Citizens Pipe Line Company this will notify your Honorable body that the ordinance, covering the same, is hereby accepted by us and under the conditions and stipulations governing the same.

Assuring you of our appreciation of your co-operation, we are,

Very truly yours, (S.) C. H. Harding, President.
Ben B. Johnston, Secretary."

[fol. 200] Fort Smith, Arkansas, May 28th, 1928.

A copy of the certificate of incorporation of the Citizens Pipe Line Company filed in the County Clerk's office on June 9, 1928, was introduced in evidence. There was also introduced a copy of the minutes of a meeting called for April 30, 1928, for organization of the Citizens Pipe Line Company and a copy of the minutes of the director's meeting on the same day showing the election of C. H. Harding as president and Ben B. Johnson as secretary of the Citizens Pipe Line Company, the instruction to petition the city council for the right to bring its gas into the city, for the appointment of a committee to arrange for the construction of a pipe line from the gas fields of the Citizens Pipe Line Company to Fort Smith with full power to act, and a further committee appointed to contract for and finance the construction of the pipe line from gas fields in Oklahoma and Arkansas "to the Harding Glass Plant in Fort Smith." These minutes were signed by all the directors of the corporation. A copy of the contract made for the construction of the pipe line from the city limits of Fort Smith to the Harding Glass Plant was also introduced in evidence.

A motion for temporary injunction was made after the filing of the complaint showing that work had been begun by appellant laying pipe in the city of Fort Smith, etc., and the purpose of the suit would be defeated unless such injunction was granted. The temporary injunction was

granted to become effective on the filing of the bond required. On the 18th day of September, 1928, upon the hearing of the cause the ordinance was declared void and the injunction made perpetual and from the decree this appeal is prosecuted.

KIRBY, J. (after stating the facts):

The ordinance of the City of Fort Smith complained of granting the right to appellant company to construct and operate its gas pipe line and to transport gas through it for consumption and use to the Harding Glass Plant was attached as an exhibit to the complaint and it has long been established that in suits in equity exhibits to the pleadings are considered as parts thereof and such exhibits as constitute the ground of the action, defense or counter-claim will control the allegations of the pleadings, ElDorado vs. Citizens Light & Power Co., 158 Ark. 550; Beavers vs. Baucum, 33 Ark. 722; American Freehold Land Mortgage Co. [fol. 201] vs. McManus 68 Ark. 263; Koons vs. Markle, 94 Ark. 573; Cox vs. Smith, 99 Ark. 218.

It it also true that grants from the sovereign power are to be construed strictly against the grantee and in favor of the City or goverment making the grant. El Dorado vs. Coates (1927) 175 Ark. 289. By section 2 of the ordinance authority or permission is given to the Citizens Pipe Line Company to construct and operate its gas pipe line "and to transport gas through it for consumption and use at the Harding Glass Plant." This language indicates no intention to grant a general franchise for supplying gas to all the consumers, both industrial and domestic in the City of Ft. Smith, who might desire to contract with the appellant company for use of gas, but is limited and restricted to the construction and operation of the pipe line and to transportation of gas for the consumption, and use of the Harding Glass Plant only. It grants only the permission of the City to transport the gas brought from the fields of the appellant company across and along the streets of the City of Fort Smith, to the Harding Glass Plant, the owner of the majority of the stock of appellant company, for use in its manufacturing plant. Appellant company had no right to cross the streets and alleys of the City with its pipe line or to furnish gas to other persons than the Harding Glass

Plant, nor to it without the permission of the City first obtained, authorizing it to do so. Barnett vs. Mays, 153 Ark. 1; Sanderson vs. Texarkana, 103 Ark. 534; Adkins vs. Harrington, 164 Ark. 280. It expressly denied and disclaimed any right of a franchise under the terms of the ordinance and any intention of attempting to transport and supply gas to any consumer within the City of Fort Smith, other than to the Harding Glass Plant, in accordance with the terms of the ordinance granting it this right.

The fact that its charter authorized it to own and control pipe lines for the transportation and sale of gas to operate as a public utility, was not sufficient to constitute it a public utility. In Clear Creek Oil & Gas Co. vs. Ft. Smith Spelter Co., 148. Ark. 260, the court said: "It was within the charter rights of the appellant to operate a business as a public utility in the production, transportation or sale of natural gas, but it was not limited to such operations, as a public utility and was not bound to so operate. It was authorized to do business in the production transportation of sale of the commodities named, other than as a public utility. The question, therefore, is not merely whether appellant was authorized to operate as a public [fol. 202] utility, but whether it elected to do so under the power thus conferred. It had right to exercise those powers or not to do so, and, in the event of its election not to do so, it could enter into private contracts not subject to public control or regulation. In other words, appellant was not [nexessarily] a public utility because its charter authorized it to become one in operation of its business, nor was it under its charter a public service corporation merely by the operation of a private business of the kind enumerated."

The appellee was without right to question the power of the city to pass this ordinance granting the permission to appellant company to furnish gas to this particular consumer since it had no exclusive franchise for supplying gas to the consumers of the City of Fort Smith. El Dorado Gas Co. vs. Coates, 175 Ark. 289; Natural Gas & Fuel Corp. vs. Norphlet Gas & Fuel Co., 173 Ark. 174.

The complaint does not allege that any damage will be done to the property of appellee on Sixth Street, or that it owns any property abuting on Sixth Street at or near the

point where the pipe line crosses said Street, nor does it allege or attempt to prove any specific injury to its property on Sixth Street or that the construction of the pipe line across such street would constitute a nuisance causing specific injury to its property and it therefore had no standing as a property owner to enjoin its construction. Packet vs. Sorrels, 50 Ark. 466; Welbourn vs. Davis, 40 Ark. 83; Rufner vs. Phelps 65 Ark. 410.

No other taxpayer joined appellee in the demand for injunctive relief and certainly the granting of the city's permission to cross its streets and alleys with the pipe line transporting gas to the Harding Glass Plant did not constitute "an illegal exaction" within the meaning of Section 13, article 16 of the Constitution, authorizing appellee to bring this suit as a citizen and taxpayer to protect the inhabitants of the City against the use of the permit. Merwin vs. Fussel, 93 Ark. 336; Waldrop vs. K. C. S. Ry. 131 Ark. 453. Although the complaint alleges that the Citizens Pipe Line Company is not required to pay the city 2% of its gross earnings from the sale of gas to the Harding Glass Company, which it was permitted to furnish under the ordinance and while the testimony shows that appellee company is required under the terms of its franchise to pay to the city 2% of its gross revenues [defived] from the sale of gas, appellee cannot [complaint] that this is an illegal exaction [fol. 203] on the part of the city since it voluntarily contracted to pay such percentage of its revenues to the city in consideration of the grant of its franchise. Then too, the city has authority under Act 124 of 1921 to make reasonable and fair rates to be charged by public utilities and if the city should exercise this right and lower the rates authorized to be charged by appellee company, certainly it would furnish no ground for a taxpayer to complain in a suit in equity that he was injured because the amount received by the city under the 2% clause was less on account of the reduction of the rates.

Appellee did not attempt to have the ordinance reviewed by the Circuit Court as to its legality, validity or fairness within the 60 days allowed therefor under Section 19 of Act 124 of 1921.

It is next insisted that appellant company acquired no right under the ordinance, not having been organized as a corporation or accepted in writing as such corporation

the permission granted within the time allowed therefor. In answer to this it may be said that even if the corporation was not organied before the passage of the ordinance the permission had been applied for by those whom it was agreed should represent it in petitioning the city council and it was accepted by such individuals for the corporation as "president" and "secretary", and the corporation was legally organized before the expiration of the time granted for acceptance of its terms by the ordinance, and the same persons who accepted the ordinance elected president and secretary of the corporation, and the undisputed testimony shows that no objection was or has been made by the city to such acceptance of the ordinance granting the permission to construct the pipe line and but for the wrongful issuance of injunction the work thereon would have proceeded to completion already.

It follows that the court erred in holding the ordinance void and enjoining the appellants from proceeding with the construction of the pipe line under the permission granted by the City authorizing it to be done and the decree must be reversed and the cause remanded with directions to dismiss complaint for want of equity and for any further necessary proceedings in accordance with the principles of equity and not inconsistent with this opinion. It is so ordered.

Mehaffy, J., dissents.

[fol. 204] STATE OF ARKANSAS:

IN THE SUPREME COURT

No. —

CITIZENS PIPE LINE Co. et al., Appellant-,

vs.

TWIN CITY PIPE LINE Co., Appellee

Appeal from Sebastian Chancery Court

Judgment, —; interest for, —; damages, —.

Costs in Supreme Court

Adv. Pd. Clk.	$11.50
Transcript	10.70
Appellants' Briefs	15.00

In testimony that the above is a true statement of the judgment and costs accrued in the above styled case, I, W. P. Sadler, Clerk of the Supreme Court of Arkansas, hereunto set my hand and affix the seal of said Supreme Court.

W. P. Sadler, Clerk, by J. H. Campbell, D. C.

(Seal.)

Endorsed: Filed Jan. 31, 1929. Oscar Durden, Clerk."

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 205] Mr. Daily: We offer in evidence certified copy of the ordinance No. 1505 granting authority to the Citizens Pipe Line Company to construct its pipe line to the plant of the Harding Glass plant, and also the proceedings of the City Commission with reference to the passage of that ordinance.

Mr. Brown: The same objection.

The Court: It will be admitted subject to the objection to be ruled on hereafter.

Said ordinance and proceedings of the City Commission being in words and figures as follows:

PLAINTIFFS' EXHIBIT 10

Ordinance No. 1505

Ordinance Granting to the Citizens Pipe Line Company the Privilege and Right to Construct, Lay, Own and Operate a Pipe Line under Certain Streets in the City of Fort Smith, Arkansas.

Be it ordained by the City Commission of the City of Fort Smith:

Be it ordained by the People of the City of Fort Smith:

Section 1. The Citizens Pipe Line Company is hereby granted the right and privilege to construct, lay, own and operate a six (6) inch gas pipe line from a point in Johnson Street, which point is at or near the Southwest corner of a tract of land owned by Maggie Walker, and running thence under and along said Johnson Street to its intersection with North Sixth Street, and thence across North Sixth Street, under and to Kelley Highway, and thence

along and under Kelley Highway to a point opposite the present Harding Glass plant and thence to the Harding Glass plant.

Section 2. The said Citizens Pipe Line Company is authorized to construct and operate said gas pipe line and to transport through said pipe line gas for consumption and use at the Harding Glass Plant.

Section 3. The said Citizens Pipe Line Company shall be required to keep said pipe line in proper condition and protect the citizens and the city from any damage or injury due to the operation of said gas pipe line; and shall replace paving in streets where pipe line was laid; and shall keep ditches, alleys and streets where pipe line laid, properly filled.

[fol. 206] Section 4. The said Citizens Pipe Line Company shall accept this grant and permisison in writing within thirty (30) days after this ordinance becomes effecctive.

Section 5. This ordinance shall become effective from and after its passage and publication.

Approved and adopted this 16th day of May, 1928.

(Signed) J. H. Parker, Mayor.

Attest: Earl Henderson, City Clerk.

(Published in Southwest American May 18, 1928.)

"Fort Smith, Arkansas, May 5th, 1928.

Called meeting of the Board of Commissioners.

Board met at 11 A. M., Hon. M. J. Miller, Acting Mayor, presiding.

On roll call the following commissioners answered present: M. J. Miller, Acting Mayor; W. H. Vaughn, Comm'r No. 2; J. H. Parker, Mayor, absent, out of city.

Quorum announced.

Acting Mayor Miller stated the meeting was called for the purpose of making report on the purchase of property on North 10th Street to open into Midland Boulevard."

* * * * * * *

No further business appearing, the meeting adjourned until 2:30 P. M. Monday, May 7th, 1928."

"City Hall,
Fort Smith, Arkansas, May 7th, 1928.

Adjourned meeting of the Board of Commissioners from May 5th, 1928. Board met at 2:30 P. M., Hon. M. J. Miller, Acting Mayor, presiding.

On roll call the following commissioners answered present: M. J. Miller, Acting Mayor, and W. H. Vaughn, Comm'r. No. 2. J. H. Parker, Mayor, absent; out of city.

Quorum announced.

Acting Mayor Miller introduced the following ordinance:

Ordinance

Ordinance Granting to the Citizens Pipe Line Company the Privilege and Right to Construct, Lay, Own and Operate a Pipe Line under Certain Streets in the City of Fort Smith, Arkansas

[fol. 207] Ordinance read the first time. Comm'r. Vaughn moved that the rules be suspended and ordinance placed on second reading. Motion was seconded by Acting Mayor Miller. On roll call the board voted as follows: "Yea" Comm'r. Vaughan and Acting Mayor Miller. All members of the board present voting in the affirmative, the motion was declared carried and ordinance read the second time. Acting Mayor Miller moved that the rules be further suspended and ordinance placed on third reading. Motion was seconded by Comm'r. Vaughn. On roll call the board voted as follows: "Yea", Acting Mayor Miller & Comm'r. Vaughn. All members of the board present voting in the affirmative the motion was declared carried. Ordinance read the third time.

Acting Mayor Miller moved that the ordinance be made a special order at 2:30 P. M. Wednesday, May 16th, 1928. Motion was seconded by Comm'r. Vaughn. On roll call all members of the board present voting in the affirmative the motion was declared carried."

"City Hall,
Fort Smith, Arkansas, May 16th, 1928.

Regular meeting of the Board of Commissioners.

Board met at 10 A. M., Hon. J. H. Parker, Mayor, presiding.

On roll call the following commissioners answered to-wit: J. H. Parker, Mayor; M. J. Miller, Comm'r No. 1, and W. H. Vaughn, Comm'r No. 2.

Quorum announced.

* * * * * * *

Comm'r Miller called for the vote on the following ordinance:

Ordinance

Ordinance Granting to the Citizens Pipe Line Company the Privilege and Right to Construct, Lay, Own and Operate a Pipe Line under Certain Streets in the City of Fort Smith, Arkansas

[Question:] Shall the ordinance pass? Board voted as follows: "Yea" Mayor Parker, Comm'r Miller and Comm'r Vaughn. All members of the board voting in the affirmative the motion was declared carried and ordinance declared passed."

[fol. 208] "Fort Smith, Arkansas, June 2nd, 1928.

Regular meeting of the Board of Commissioners.

Board met at 10 A. M., Hon. J. H. Parker, Mayor, presiding.

Members present: J. H. Parker, Mayor, and W. H. Vaughn, Comm'r No. 2. M. J. Miller out of city.

Quorum announced.

The meeting adjourned until Monday, at 2:30 P. M. June 4, 1928."

"Fort Smith, Arkansas, June 4, 1928.

Adjourned meeting of the Board of Commissioners from June 2nd, 1928. Board met at 2:30 P. M., Hon. M. J. Miller, Acting Mayor, presiding.

On roll call the following members answered present: M. J. Miller, Acting Mayor, and W. H. Vaughn, Comm'r No. 2. J. H. Parker, Mayor, absent, on account of sickness.

Quorum announced.

The following communication was received from C. H. Harding, president of the Citizens Pipe Line Company:

'GENTLEMEN: In harmony with your recent action in passing the ordinance for the laying of a pipe line by the Citi-

zens Pipe Line Company, this will notify your Honorable Body that the ordinance, covering the same, is hereby accepted by us and under the conditions and stipulations governing the same.

Assuring you of our appreciation of your cooperation, we are,

Very truly yours, (Signed) C. H. Harding, President.. (Signed) Ben B. Johnson, Secretary.'

STATE OF ARKANSAS,
County of Sebastian, ss:

I, George T. Carnall, City Clerk of the City of Fort Smith, Arkansas, hereby certify that the attached five pages is a true copy of ordinance No. 1505 granting the Citizens Pipe Line Company the privilege and right to construct, lay, own and operate a pipe line under certain streets in the City of Fort Smith, Arkansas. Passed and approved [fol. 209] May 16th, 1928 and published in the Southwest American May 18th, 1928, and copy of minutes relating thereto.

In testimony whereof I hereunto set my hand and seal as said City Clerk this 30th day of April, 1929.

Geo. T. Carnall, City Clerk. (Seal.)"

Thereupon the plaintiff offered in testimony, which was admitted over defendant's objection, a certified copy of the notice filed by the Twin City Pipe Line Company relating to its change of industrial rates. The said notice which is Exhibit No. 11 is in words and figures as follows:

"PLAINTIFFS' EXHIBIT 11

Notice of the Twin City Pipe Line Company with reference to raising the industrial gas rates was received and ordered filed. No further action was taken. Notice is as follows:

Board of Commissioners, City of Fort Smith, Arkansas:

The Twin City Pipe Line Company, an Arkansas corporation, hereby notifies the Commission that its rates for the following class of service, beginning, September 1, 1928, will be as follows:

Power and Industrial Rates

For the first three million cubic feet used in one month, fifteen cents (15¢) per thousand.

The present rates are:

First Million cubic feet used in one month, fifteen cents, (15¢) per thousand.

Second Million cubic feet used in one month, fourteen cents, (14¢) per thousand.

Third million cubic feet used in one month, thirteen cents, (13¢) per thousand.

All over three million cubic feet used in one month, twelve (12¢) per thousand.

The Twin City Pipe Line Company states to the Commission that it is a public utility engaged in the transpor-
[fol. 210] tation and sale of natural gas in the City of Fort Smith pursuant to ordinance No. 1148 of the City of Fort Smith, Arkansas, which was a franchise granted to W. J. Echols and his assigns and by the said Echols assigned to the Twin City Pipe Line Company, said franchise and ordinance having been construed by the United States District Court for the Western District of Arkansas in the case of Twin City Pipe Line vs. City of Fort Smith, et als. 434 Equity, in an opinion rendered by the Court on June 8, 1927, and the final decree pursuant to said opinion, from which decree the City and the Twin City Pipe Line Company by agreement did not appeal.

Twin City Pipe Line Company, by (Signed) A. G. Williams, Jr., Manager.

State of Arkansas,
City of Sebastian, ss:

I, George T. Carnall, City Clerk, of the City of Fort Smith, Arkansas, hereby certify that the attached is a true copy of the minutes of the meeting held by the City Commission of the City of Fort Smith, Arkansas, on the 2nd day of August, 1928, pertaining to the rates for power and industrial uses proposed by the Twin City Pipe Line Company.

In testimony whereof I hereunto set my hand and seal as said City Clerk this 2nd day of May, 1928.

(Signed) Geo. T. Carnall, City Clerk."

C. H. HARDING, a witness sworn on behalf of the defendant, testified as follows:

Direct examination.

By Mr. Brown:

Q. State your name.
A. C. H. Harding.
Q. What is your business, Mr. Harding?
A. President and General Manager of the Harding Glass Co.
Q. How long has the Harding Glass Company been in operation in Fort Smith?
A. Since December 11, 1917.
Q. How long have you been President and General Manager of the Harding Glass Company?
A. During all the time since that date.
[fol. 211] Q. There has been introduced in evidence the original contract upon which this suit is based between the Harding Glass Company, Industrial Oil & Gas Company and the Twin City Pipe Line Co. that is signed Harding Glass Company by C. H. Harding, President. Did you sign that contract Mr. Harding?
A. Yes, sir.
Q. I wish you would state briefly the transactions leading up to the signing of that contract?

Mr. Daily: We object to a prior negotiation merged into a written contract, as incompetent, irrelevant and immaterial.

The Court: What do you say as to that objection, Mr. Brown?

Mr. Brown: We think, Your Honor, it is admissible for the purpose of showing the surrounding circumstances leading up to the entering into of the contract for the reasons that they have gone into matters tending to prove the same character of allegations, that is, they went into the prior law suits that have existed up to and the negotiations leading up to the execution of this contract.

The Court: I do not understand that they have gone into any negotiations at all.

Mr. Brown: They introduced here the pleadings and decrees.

The Court: They are not negotiations, Mr. Brown; they are documents that relate to certain controversies, but they can't be said to be negotiations.

Mr. Brown: Well, we offer to prove by Mr. Harding the negotiations between him and Mr. W. R. Martin leading up to the signing of this contract.

Mr. Daily: We object.

The Court: Sustained.

Mr. Brown: Save an exception. In order to complete the record we want to offer to prove by Mr. C. H. Harding that at the time this contract was brought to him to sign at his place of business, the Harding Glass Company, Mr. W. R. Martin, President of the Twin City Pipe Line Co. and the Industrial Oil & Gas Company, stated to him that they were going to do even better in this contract than they had agreed to in the oral negotiations; that in the oral negotiations they agreed to lay an 8 inch line from the Johnson Street 10 inch main to the Harding Glass Plant, [fol. 212] whereas in the written contract that they presented Mr. Harding they agreed to lay an 8 inch line from the Johnson Street ten inch line to the Harding Glass Company, and also from the 8 inch Sixth Street line to the Harding Glass Company.

The Court: Do you object?

Mr. Daily: Yes, sir.

The Court: I don't see what application that has here. What is in your answer that warrants that proof?

Mr. Brown: Just for the purpose I stated a moment ago.

The Court: Let me see what allegation that you set up in your answer upon which you base your claim that this is competent proof.

Mr. Brown: I think it would be admissible, Your Honor, under the proposition that their answer denies that this is a valid and binding contract. It sets up that the putting in of the 8 inch line was doing only what was required of the Twin City Pipe Line Co. as a public utility, and that light is thrown upon that proposition by the statement of Mr. W. R. Martin to Mr. Harding by the statement that they would give him even better than he agreed to in their negotiations, as tending to show that this line was absolutely necessary to give them reasonable service out there.

The Court: I don't think that would reach it. Objection is sustained.

Mr. Brown: Save an exception.

Q. Mr. Harding, it has been stated in testimony here that the Hale interests were purchased by the plaintiffs the Twin City Pipe Line Company and the Industrial Oil & Gas Company along in October of 1923. It has also been shown in evidence that just prior to that time, that you had entered into a contract with S. H. Hale individually for ten [per] cent gas over a period of 5 years. I will ask you if you were served with that ten cent gas by the plaintiffs in this cause of action for any period after they took over the Hale interests?

A. Yes, sir.

Q. For what period of time were you served with ten cent gas?

A. We were served from October, 1923, to the time of our formal notice from the Twin City people January 24, 1925.

[fol. 213] Q. Have you got that formal notice?

A. Yes, sir.

Q. There with you?

A. Yes.

Q. Is this the notice that you received from the Twin City people?

A. Yes, sir.

Mr. Brown: We desire to introduce this in evidence as an exhibit to the witness' testimony.

Mr. Daily: We do not object.

The Court: Very well; it will be received.

Said notice being in words and figures as follows:

DEFENDANT'S EXHIBIT 1

Fort Smith, Arkansas, January 24, 1925.

Harding Glass Company, Fort Smith, Ark.

Attention Mr. C. H. Harding

GENTLEMEN:

On August 6, 1923 you entered into a contract with Mr. S. H. Hale for your requirements of gas for fuel at your glass

plants. Your supply of gas thereunder was to come from the well or wells individually owned by Mr. Hale and from any gas contracted for by him. Mr. Hale entered into a contract with the Clear Creek Oil & Gas Company to transport said gas from the field to you as he owned no transporting lines individually.

At the time this contract was entered into Mr. Hale owned only one well which is located on the Boren land near Alma, Arkansas. Mr. Hale never drilled any other wells nor did he contract for any gas. Your supply therefore was and still is limited to the production from the one well mentioned above.

On November 1st, 1923 the Twin City Pipe Line Company became the owner of the contract between you and Mr. Hale.

It is the intention of the Twin City Pipe Line Company to carry out the contract and to give you everything you are entitled to thereunder.

Your consumption since the Twin City became the owner of the contract has far exceeded the amount of gas that the Boren well has put into the line notwithstanding the fact that the well has been kept on the line constantly ever since [fol. 214] that time and has been allowed to work at its full capacity and its maximum ability.

The rock pressure of the Boren well on January 1st, 1925 was only 132 pounds and the open flow only 2,620,000 cubic feet per day.

Below is a comparative statement of the well production as against your consumption from November 1st, 1923 to January 17, 1925, inclusive.

Mo.	Volume taken from Boren well	Mo.	Volume consumed by plants
1923.	1923.		
Nov.	None	Nov.	808
Dec.	20,403	Dec.	3815
1924.	1924.		
Jan.	27,997	Jan.	41818
Feb.	11,595	Feb.	45421
Mar.	19,972	Mar.	48189
April	25,110	April	45311
May	10,252	May	24458
June	2,656	June	2

Mo.	Volume taken from Boren well	Mo.	Volume consumed by plants
July	22,119	July	8
Aug.	54,659	Aug.	20
Sept.	17,322	Sept.	239
Oct.	15,415	Oct.	11619
Nov.	13,500	Nov.	30340
Dec.	8,091	Dec.	42641
1925.			
1/1 to 1/8	4,962	1/1 to 1/8	37008
Total	224,052		331,697
Consumption exceeds production			107,645

You can readily see that the well is incapable of delivering your requirements of gas and that up to January 18, 1925 we have furnished 107,645,000 cubic feet of gas acquired from sources other than those as contracted for.

While it is our intention as above stated to give you everything to which you are entitled under the contract, we have furnished a large amount of gas in excess of the production from your contractural sources at the contract price of ten cents per thousand which we can not continue. Therefore on and after Feb. 1st, 1925 you will be billed on our regular schedule of rates, that is, fifteen cents per [fol. 215] thousand cubic feet for the first million, fourteen cents per thousand cubic feet for the second million, thirteen cents per thousand cubic feet for all over three million cubic feet consumed in one month; and whenever the production of the Boren well has put into the line an amount of gas equivalent to the difference between your consumption of gas and the well's total production from November 1st, 1923 to February 1st, 1925, we will at that time begin billing you for all the gas the Boren well will deliver into the line, at ten cents per thousand cubic feet and all your consumption in excess of said well's delivery will be billed you at our regular schedule of rates—as above set out.

This contemplates segregating for your consumption the entire productive capacity of the well which we consider a liberal interpretation of the contract.

Very truly yours, Twin City Pipe Line Company, by A. G. Williams, Jr., Superintendent.

AGW'Jr:R.

Q. That is the letter which you received from them?
A. Yes, sir.
Q. It has been testified here, or there has been introduced in evidence certain pleadings and documents relating to two law suits brought by the Twin City Pipe Line Co. against you for back rates. Were those law suits predicated upon your refusal to comply with that letter?
A. As a layman, I suppose they were.

By Mr. McDonough:

Q. Mr. Harding, have you the contract between your company and Mr. Hale in which he agreed to furnish you the ten cent gas?
A. Yes, sir.
Q. Is it here in the court room?
A. It was submitted at the other trial.
Q. Have you got that original contract?

Mr. McDonough: We want to introduce it while Mr. Harding is on the witness stand, but of course, we haven't had time to go over there and get the copy. We want to offer it in testimony.
The Court: How can you offer it without producing it?
Mr. McDonough: We can't do it, Your Honor. I think we had better pass that for the present.

[fol. 216] Q. Mr. Harding, how long have you been in the glass business?
A. 25 years as a workman and 25 years as a manufacturer.
Q. State whether or not your company made any improvements in your plant last year?
A. Yes, sir; very large improvements.
Q. At about what cost?
A. $300,000.00.
Q. To what extent was your plant enlarged last year?
A. Well, that is a word I would not use. It was changed last year from one system to another.
Q. Did you enlarge the capacity of it?
A. The change enlarged the output, yes sir.
Q. Mr. Harding, state whether or not you could or would make that enlargement, or make the investment that you

have made in that plant, if you had only three or four or five years supply of gas?

Mr. Daily: That is objected to, if Your Honor please.

The Court: He may answer subject to the objection and I will rule on it hereafter.

A. We would not.

Q. Why?

A. We couldn't afford to.

Q. Give the reason why.

A. We would rather move where we could get an initial supply of gas at a lower rate.

Q. Do you recall when the Citizens Gas Company began making the development to get a gas supply, about when that was?

A. Yes, sir.

Q. When was it?

A. It was about the time when we saw that we had to change from the hand method out there to the machine method and spend a great deal of money.

Q. What was the purpose in making development or expending money in developing a gas field?

A. To take care of our future requirements at a nominal price.

Q. State whether or not gas in large quantities is necessary for the production of glass?

A. It is preferred, although glass can be made from oil, either natural gas or manufactured gas is preferred.

Q. State whether or not glass companies usually go to gas fields in order to build the plants in order to get the fuel?

A. Yes, sir.

[fol. 217] Q. Did the existence of this gas field here have anything to do with your locating your [gas] plant here?

A. One hundred per cent.

Q. State whether or not you would locate a glass plant of the size of this for the manufacture of glass, in a field where you could only have a supply of three or four or five years?

A. I would not.

Q. State whether or not the Twin City Pipe Line Company failed to furnish a sufficient supply of gas for your

company any time prior to the bringing of the suit, the records of which have been introduced here. I do not recall the dates. If you remember the date I wish you would state it, and state whether or not the Twin City Pipe Line Company failed to furnish a sufficient supply of gas?

Mr. Daily: Before or after the execution of this contract, Mr. McDonough?

Mr. McDonough: Before.

A. I understand you want to know whether we had sufficient gas previous to the time of our entering into this contract?

Q. Not exactly that Mr. Harding. What I am asking is whether or not there was a failure of gas for your plant, that is, whether or not the Twin City failed at any time to furnish sufficient gas to enable your operations to go on?

A. There was a tremendous shortage, and a tremendous loss to the Harding Glass Company during the winter of 1924-1925.

Q. Did you have any source of supply at that time except the Twin City Pipe Line Company?

A. Did not.

Q. Can you state approximately about what that loss was?

A. I have contended among our own people that it exceeded——

Q. I just want you to state your facts.

A. My best judgment is that it exceeded $50,000.00.

Q. Well, state the facts which are the basis of that judgment?

A. By not having sufficient gas the quantity of a thousand tons of molten glass in our furnaces went from high quality to low quality, and we were never able to remedy it afterwards.

Q. State whether or not you were in that stage of manufacturing it is necessary to have continuous gas flow in order to complete your manufacture?

[fol. 218] A. It is.

Q. How long did that shortage of gas exist?

A. Through the winter months.

Q. How soon after that, if it was after it, did you begin making an investigation to see if sufficient supply of gas could be developed on your own account?

A. In the following summer.

The Court: What summer was that?

A. The summer of 1925.

Q. That field was in what state?

A. Oklahoma.

Q. And was it finally developed so that gas was found and produced there?

A. Yes, sir.

Q. How many wells have been drilled there?

A. Five wells in Oklahoma.

Q. At about what expenes in round numbers, just give it the best you can.

A. Since one of them was very costly I would say $40,000.00.

Q. What was the expense approximately of building the pipe lines from those gas wells to the Harding Glass Plant?

A. $55,000.00.

Q. I wish you would state whether or not it is a safe investment for any glass company to invest anywhere from $300,000.00 up to $700,000.00 in a gas field where the supply is only for three, four or five years?

A. I would not do it with my money.

Q. Now Mr. Harding, you heard the conversation detailed by Mr. Williams between you and him. I wish you would state in your own way your recollection of what occurred after the receipt of the first letter introduced in evidence this morning, the one referring to the statement of Mr. Lyman?

A. After receiving the first letter from Mr. Williams notifying us that we would be expected to hold to our contract, I visited Mr. Williams and talked things over with him, and without any particular satisfaction. After receiving the second letter from Mr. Williams,—I am not so sure about that——

Q. Wait a minute, Mr. Harding, going to the first conversation, I wish you would detail to the Court just as near as you can recollect what was said by you and what was said by Mr. Williams?

A. I don't recall so much about the first visit, whether there was two or one, Mr. Williams recited quite keenly this morning in his evidence that conversation with some [fol. 219] slight exceptions wherein we chatted about things when he sent us that letter, and said that he had noticed in the paper a statement that we expected to use our own gas. I said to him that we expected to use or own gas. He wanted to know if we had not had service and I said yes, since the Winter of 1924-1925 we had had service. He wanted to know what our own reasons was for bringing in our own gas, and I said: "Mr. Williams, I have been following natural gas fields for 35 years. I already know that you people intend to advance your price and I already know that we have been paying you more than our competitors are paying for gas, and it is not a safe proposition for us to constantly increase our investment without trying to provide for gas. That is our reason for trying to bring in our own gas. It is self-defense." I said to him: "I have not heard that you have made any great development of gas in your own field, but whether that is so or not, it occurs to us it would be the proper thing to do to provide ourselves for having our own gas for our own consumption in order to make it possible for us to use our investment in Fort Smith."

Q. What was said between you and him on the question of whether or not it was necessary for you to have a supply for a long time?

A. Well, I said to Mr. Williams that we spent $300,000.00 last year on improvements in our plant and we were not through spending; that the business was going through an epoch, and I think I recited to him that six years ago there was sixty-odd concerns manufacturing window glass in the United States and today there were only fourteen; that it was a graveyard, and I says we could only expect to stay in the business and were able to keep up with the developments in the manufacture of glass, and for these reasons we had decided to stay in Fort Smith, or undertake to stay in Fort Smith instead of going to Amarilla or Marshall, Texas, where we had been invited to come, and Monroe, La. had invited us to come for cheap fuel, we had decided to bring in our own gas and stay in Fort Smith. I think that is about the conversation.

Q. With the exception of this contract I think that is all I want to ask Mr. Harding. Mr. Harding, after that in your conversation with Mr. Williams what was said, if anything, about partial service to the Harding Glass Company?

A. Mr. Williams said to me at a conference that they would like to complete service to the Harding Glass Company, but that they would not be willing to accept partial service, and they would not furnish partial service.

[fol. 220] Cross-examination.

By Mr. Daily:

Q. Mr. Harding, the date of the contract which you hold in your hand is the 30th day of August, 1926?

A. Yes.

Q. That is the contract in issue in this case? The $300,000.00 expenditure that you made on your plant was made after the execution of that contract was it not?

A. Yes, sir.

Q. You state that you first began to be interested in the gas business sometime after that shortage, and I understood from your testimony that you became interested in it for the Harding Glass Company, but that the company, the gas company that you actually used to drill your wells for the Harding Glass Company was named the Citizens Gas Company. Is that a fact.

A. Yes, sir, that is correct. The development in 1925 was very meager. It was through a trusteeship.

Q. Well, at any rate, the Citizens Gas Company as a matter of fact, had it been organized before the signing of this contract or afterwards?

A. I think that it was,—the trusteeship was previous to this contract.

Q. You mean the organization by which you started to develop the gas, that the Citizens finally got started prior to that contract?

A. Yes.

Q. Whether the company itself was actually organized before that contract or after that contract, you don't recall?

A. Oh yes I do.

Q. All right then.

A. The company was organized since that time.

Q. Who is the president of the Citizens Gas Company?
A. C. H. Harding.
Q. You yourself?
A. Yes, sir.
Q. And you are also president and General Manager of the Harding Glass Company?
A. Yes, sir.
Q. And you stated in your direct examination that what you really had in mind with the Citizens Gas Company, that is meant to develop your own gas, meaning Harding Glass Company?
A. No, I didn't.
Q. What did you mean?
A. Develop gas for the Harding Glass Company.
[fol. 221] Q. At a nominal price, wasn't that your language?
A. Yes, sir.
Q. I hand you certified copy of the last annual statement made by the Citizens Gas Company which bears date of the 11th day of February, 1928, and purports to have been signed by you as president and Ben Johnston as secretary, and purports to have been filed in the Office of the County Clerk on the 14th day of February, 1928. You made and signed and swore to that annual statement, didn't you?
A. I think so without checking it.
Q. Well, according to that annual statement the Harding Glass Company owns 337½ shares of stock in the Citizens Gas Company?
A. That is correct.
Q. And the next largest stockholder in it was Harry Lyman with 32 shares?
A. I would not be able to say.
Q. Well, the number of shares and the stockholders are correctly set forth?
A. Why there is Ben Johnston with 52½.

Mr. Daily: We offer it in evidence, if Your Honor please.
Mr. McDonough: We object to it on the ground that it is not relevant to the issues here. I don't see the purpose of it.
Mr. Daily: The purpose of it, if Your Honor please, is to show that the Harding Glass Co. itself developed this gas through the instrumentality of its own company, to follow

that up and show that they built the pipe line coupled with the record in this case already, that, is, that record in the Supreme Court of Arkansas, and the ordinance, for the sole purpose of supplying gas to the Harding Glass Co. in violation of this contract.

Mr. Brown: That is admitted. Mr. Harding admitted that. I mean that Mr. Harding admitted that they developed that field over there for the purpose of furnishing gas to the Harding Glass Company.

The Court: I think it is competent. The objection will be overruled.

Said annual statement being in words and figures as follows:

"P. X. 12, JKP.

Corporation's Annual Report

We, the undersigned C. H. Harding, President, and W. E. Harding, Secretary of the Citizens Gas Company, a corpo- [fol. 222] ration duly established under the laws of the State of Arkansas, and in compliance with said laws, do hereby make their report, showing the condition of the affairs of said corporation as nearly as the same can be ascertained, on the first day of January, 1928, next preceding the date hereof:

Amount of capital actually paid in, $66,382.86.

Name of each stockholder	No. of shares
George Reynolds	15
William Spear	15
Eugene Copp	33
I. H. Nakdimon	7.5
Ben Johnston	52.5
Walter Hinton	12.5
Harry Lymon	32.5
Harding Glass Co.	337.5
Mr. C. H. Harding	20
Mrs. C. H. Harding	2.5
Leon Williams	22.5
Dr. Holt	6.25
A. J. Burke	9.5
J. B. Mayfield	3.33
Geo. Branner	2.5
Wayne Harding	8.25

Name of each stockholder	No. of shares
F. L. Reese	2.50
Jeff Nix	10
C. H. Wortz	3.33
A. J. Lewis	7.5
O. D. Caton	2.5
May Reynolds	5
Dr. Dorenti	2.5
Mrs. Paden	.5
Eugene Young	15
Bruce Roger Co.	2.5
E. Koller	.5
T. C. Gray	2.5
J. Reynolds	1
Leon Sortet	2.5
W. O. Shouse	2.5
U. O. Lambiotto	5
Oscar Lambiotto	2.5
G. Felleur.	3.5
J. H. Carnahan	.5
William King	10.85

[fol. 223] Witness our hands and seals this 11th day of February, 1928.

C. H. Harding, President. (Seal.) Ben B. Johnston, Secretary. (Seal.)

Affidavit

STATE OF ARKANSAS,
Fort Smith District,
County of Sebastian, ss:

We, the undersigned President and Secretary of said corporation, each being duly sworn, state on oath that the matters and things set out in the foregoing report are true and correct to the best of our knowledge and belief.

C. H. Harding, President. Ben B. Johnston, Secretary.

Subscribed and sworn to before me this 14th day of February, 1928. William Arthur Spear, Notary Public. My commission expires Mar. 23, 1928. (Seal.)

Filed Feb. 18, 1928. Earl Dawson, Clerk.

Certificate

STATE OF ARKANSAS,
Fort Smith District,
County of Sebastian, ss:

I, Earl Dawson, Clerk of the County Court in and for the County and State aforesaid do hereby certify that the annexed and foregoing is a true and perfect copy of the Corporation Annual Report of the Citizens Gas Company, as the same appears of the records and files now in this office in record book "M" at page 323, of the records of the Annual Reports.

Witness my hand and seal of said court on this 29th day of April, 1929.

Earl Dawson, County Clerk."

Q. Now, Mr. Harding, the pipe line that was built from the gas wells of the Citizens Gas Co. was built by the Citizens Pipe Line Company?

A. Yes, sir.

Q. Which was a separate corporation?

A. Yes, sir.

[fol. 224] Q. You are also president of that corporation?

A. Yes, sir.

Q. There has been introduced in evidence the ordinance granting the Citizens Pipe Line Company the right to construct the pipe line after it reaches the City of Fort Smith, as Exhibit 10. Section 2 of that reads as follows: The said Citizens Pipe Line is authorized to construct and operate said gas pipe line and to transport through said pipe line gas for consumption and use at the Harding Glass plant. As a matter of fact, that is the person to whom they do transport or sell gas, is it not?

A. Yes, sir.

Q. To refresh your memory, don't you know as a matter of fact, the Citizens Gas Company was formed on March 26, 1926, which was some three months before the signing of the contract involved in this lawsuit?

A. Well, I couldn't recall those dates. It is barely possible that the application went in at that time. Do you mean to say that the charter was issued on that date?

Q. That is what I am asking you?

A. I can't tell without the documents.

Q. You won't say that is not so?

A. No, I would not say that is not so.

Q. Now this letter which you have introduced in evidence dated January 24, 1925, which was written long before the trial of the former lawsuit between these same parties, the record of which has been introduced in this case, wasn't it? The fact is it was the writing of this letter and what grew out of it that brought about one of those lawsuits?

A. I would say that this is the date of that other lawsuit.

Q. That is the first one?

A. Yes.

Q. Now that letter, as a matter of fact was introduced as an exhibit in the former lawsuit and that is where you got it in the United States Clerk's office a few minutes ago to introduce it?

A. I didn't get it.

Q. Well, your attorney, Mr. Joe Brown?

A. I presume he did.

Q. Well, you know it is in the other record in the law suit in this court?

A. I couldn't tell you about that.

Q. Isn't that your impression?

A. I would think so.

Q. You have testified that prior to the signing of the contract that is involved in this lawsuit in the winter of 1924-1925 that the Twin City Pipe Line Company failed to furnish you an adequate supply of gas during a part of the winter. Since the signing of this contract that is involved [fol. 225] in evidence in this case, has there even been a day that you failed to get your entire requirements of the Twin City Pipe Line Co. when you were connected?

A. We were told at once if we would pay the price that we could get the gas.

Q. I asked you if there was ever a day since the contract was signed that you have not gotten an adequate supply of gas?

A. I don't think there has been a day.

Q. Mr. Harding, the shortage of gas in the winter of 1924 and 1925 was one of the very issues in the former lawsuit, the record of which has been introduced in evidence, wasn't it?

A. I think that that was one of the things in our complaint was that we asked for the stopping of discrimination.

Q. And for damages?

A. Yes, sir.

Q. Now that case after it was decided, the settlement of the appeals of that lawsuit that are mentioned in this contract that is in evidence in this case——

Mr. McDonough: I object to that, Your Honor, because it is going into the very thing that counsel themselves objected to. It looks to me like that is negotiations leading up to this contract.

Mr. Daily: All right; I withdraw it.

Mr. McDonough: Your Honor, I want to get that contract.

The Court: Then you will agree and let it be attached as an exhibit without anything more?

Mr. Daily: Yes, sir. I would like to furnish certified copy of articles of incorporation of the Citizens Gas Co. to show that it was incorporated prior to the date of this contract.

Mr. McDonough: We just want to save the same objection to that that we have been offering to the others.

The Court: You make the objection that it is incompetent and irrelevant?

Mr. McDonough: Yes.

The Court: Very well; it will be received subject to the objection to be ruled on hereafter.

[fol. 226] Redirect examination.

By Mr. McDonough:

Q. Mr. Harding, did the development of gas or expenditure for the development of gas begin under the trusteeship prior to the organization of your Citizens Gas Company?

A. Yes, sir.

Articles of Agreement and Incorporation of Citizens Gas Company

Know all men by these presents:

That the corporators hereinafter named have this day, and by these presents, formed a Corporation under and in pursuance of the laws of the State of Arkansas, in that behalf provided, for "Incorporations for manufacturing and other lawful business," and in evidence thereof, do hereby execute the following Articles of Incorporation:

First. The name of said Corporation shall be Citizens Gas Company.

Second. The corporators are C. H. Harding, Harding Glass Company, a Corporation, Ben B. Johnson, Leon A. Williams, I. H. Nakdimen, W. L. Hinton, William A. Spear, George F. Reynolds, Mrs. C. H. Harding, H. P. Lyman, A. J. Burke, Eugene Kopp, Chas. S. Holt, J. B. Mayfield of Fort Smith, Arkansas, and George C. Branner of Little Rock, Arkansas.

Third. The place of business is to be located at Fort Smith, Arkansas, and its office for the transaction of business shall be in said City of Fort Smith, Arkansas, or at such other place as the Board of Directors may select.

Fourth. The general nature of the business proposed to be transacted by this Corporation is (A) To prospect for and mine oil, gas and other minerals. (B) To acquire oil and gas plants in fee or by lease. (C) To own, hold or rent pipe lines, refining plants and to acquire and dispose of all features connected with the oil and gas business. (D) To manufacture, transport, market, buy, sell and deal in all features of oil and gas products. (E) To acquire, hold, own, demise and dispose of real estate. (F) To purchase, construct, own, demise, and sell all kinds of house, building and structures. (G) To acquire, operate, own, hold and dispose of coal mines and other minerals and gas producing plants. (H) To own, operate and dispose of such rolling [fol. 227] stocks as trucks and tank cars for the transportation of both gasoline and petroleum products, and to own railroads necessary for the performances of such work. (I) To acquire, own, hold and dispose of the corporate stocks and securities of other corporations, and to guarantee and underwrite the obligations and securities of other stocks and corporations. (J) To do and perform all matters and things incident or necessary to the carrying out of any of the powers herein specifically conferred or implied.

Fifth. The amount of capital stock of said Corporation tion shall be One Hundred Fifty Thousand Dollars, ($150,000), of which One Hundred Thirty-five Thousand, ($135,000) has been subscribed by the corporators aforesaid, and

the residue thereof may be issued and disposed of as the Board of Directors may from time to time order and direct.

Sixth. The said Capital stock shall be divided into fifteen hundred shares (1500) of the value of $100.00 each.

Seventh. The affairs of business of the corporation shall be conducted and controlled by a Board of Directors consisting of seven (7) members, all of whom shall be stockholders of the Corporation. Said Board of Directors shall elect one of its members as President, and one of its members as Vice President, and shall also elect a Secretary, Treasurer, and an Assistant Secretary.

Eighth. The first election for Directors shall be held immediately after the organization of the Coporation, and said Directors shall serve for one year, and until their successors are elected.

Ninth. The Board of Directors are empowered by unanimous vote to change all by-laws of said Corporation, and alter and repeal the same at pleasure as provided in the by-laws.

Tenth. The first meeting of said corporation for organization shall be held in Fort Smith, Arkansas, at the office of Lyman Real Estate Company at 4 o'clock P. M. on the 24th day of February, 1926.

The subscribers hereto waive notice of said meeting.

[fol. 228] In testimony whereof we have hereunto set our hands, on this the 24th day of February, 1926.

C. H. Harding, Harding Glass Company, a Corporation; Ben B. Johnston, Leon A. Williams, I. H. Nakdimen, W. L. Hinton, William A. Spear, Mrs. C. H. Harding, H. P. Lyman, A. J. Burk, Eugene Kopp, Chas. S. Holt, J. B. Mayfield, George C. Branner, George F. Reynolds.

Certificate.

Whereas, C. H. Harding, Harding Glass Company, a Corporation, Ben B. Johnston, Leon A. Williams, I. H. Nakdimen W. L. Hinton, William A. Spear, George F. Reynolds, Mrs. C. H. Harding, H. P. Lyman, A. J. Burke, Eugen Kopp, Chas. S. Holt, J. B. Mayfield, George C.

Branner, have associated themselves together as a body politic and corporate, to be known as Citizen Gas Company.

And Whereas, the said corporators being the subscribers to the capital stock of said corporation have waived the fifteen (15) days notice as required by law and called a meeting for organization to be held in Fort Smith, Arkansas, at the office of Lyman Real Estate Company at four o'clock P. M. on the 24th day of February, 1926.

Whereas, at the time and place above set out, a meeting of the subscribers aforesaid was held to organize said Corporation and elect seven (7) Directors, and

Whereas, at the said meeting the following gentlemen were elected Directors, to-wit: C. H. Harding, H. P. Lyman, W. E. Harding, Leon A. Williams, Wiliams. A. Spear, W. L. Hinton, and Ben B. Johnston.

And Whereas, at a meeting of said Board of Directors, C. H. Harding was elected President, and W. E. Harding was elected Vice-President, and Ben B. Johnston was elected Secretary and Ben B. Johnston was elected Treasurer, and William A. Spear, was elected Assistant Secretary.

[fol. 229] Now Therefore, the said C. H. Harding, as President, and The W. E. Harding, H. P. Lyman, Leon A. Williams, William A. Spear, W. L. Hinton, and Ben B. Johnston, as Directors, do, in pursuance of law, issue this, their, certificate, verified by their oaths and do hereby certify as follows:

First. Said corporation is formed for the purpose of (A) Prospecting for and mining oil, gas and other minerals, (B) Acquiring oil and gas plants in fee of by lease (C) Owning, holding, or retaining pipe lines, refining plants, and acquiring and disposing of all features connected with the oil and gas business. (D) Manufacturing, transporting, marketing, buying, selling and dealing in all features of oil and gas production, (E) acquiring, holding, owning, demising and disposing of real estate, (F) Purchasing, constructing, owning, demising and selling all kinds of houses, buildings and structures. (G) Acquiring, operating, owning, holding, and disposing of coal mines and other minerals and gas producing plants. (H) Owning, operating and disposing of such rolling stock as trucks and tank cars for the transportation of both gasoline and petroleum products and to run railroads necessary for the performance of such

work. (I) Acquiring, owning, holding, and disposing of the corporate stock and securities of other corporations, and to guarantee and underwrite the obligations and securities of other stocks and corporations. (J) Doing and performing all matters and things incident or necessary to the carrying out of any of the powers herein specifically conferred or implied.

Second. Its capital stock is One Hundred Fifty Thousand Dollars, ($150,000), divided into shares of $100.00 each.

Third. Forty Five Thousand — ($45,000) of said capital have been actually paid in by the subscribers hereto.

Fourth. The names of the Stockholders and the number of shares owned by them respectiyely is as follows:

Name	No. of shares
F. H. Harding	37½ shares
Harding Glass Company, a Corporation	625 shares
Leon A. Williams	45 shares
I. H. Nakdimen	15 shares
W. L. Hinton	45 shares
William A. Spear	45 shares
George F. Reynolds	45 shares
H. P. Lyman	20 shares
Eugene Kopp	90 shares
[fol. 230] Chas. S. Holt	15 shares
A. J. Burke	22½ shares
J. B. Mayfield	11¼ shares
George G. Branner	11¼ shares
Ben B. Johnston	135 shares
Mrs. C. H. Harding	7½ shares

In testimony whereof the said C. H. Harding, President of the said Corporation and W. E. Harding, H. P. Lyman, Leon A. Williams, W. A. Spear, W. L. Hinton, and Ben B. Johnston, a majority of the Board of Directors of said Corporation, have hereunto set their hands, on this 24th day of February, 1926.

C. H. Harding, President; W. E. Harding, William A. Spear, Ben B. Johnston, Leon A. Williams, W. L. Hinton, H. P. Lyman, Directors.

STATE OF ARKANSAS,
County of Sebastian, ss:

C. H. Harding, W. E. Harding, H. P. Lyman, Leon A. Williams, W. A. Spears, W. L. Hinton, and Ben B. Johnston, on their oath says that the matter and things in the foregoing certificate set out, are true to the best of their knowledge and belief.

(Signed) C. H. Harding, W. E. Harding, William A. Spear, Ben B. Johnston, Leon A. Williams, W. L. Hinton, H. P. Lyman.

Subscribed and sworn to before me this the 24th day of March, 1926. In testimony whereof I have hereunto set my hand and seal of office. H. S. Patterson, Notary Public. My commission expires March 4th, 1929. (Seal.)

[fol. 231] Certificate of Record

STATE OF ARKANSAS,
County of Sebastian:

I, Wm. J. Dearen, Clerk of the County and Probate Courts of Sebastian County in the State Aforesaid, do hereby certify that the foregoing instrument of writing was filed for record in my office at Fort Smith in the Fort Smith District of Sebastian County, Arkansas, on the — day of March, 1926.

——— ———, County Clerk.

Endorsed: Filed March 26th, 1926. Wm. J. Dearen, Clerk, by Leota C. Pettigrew, D. C.

Certificate of Record

STATE OF ARKANSAS,
County of Sebastian,
Fort Smith District, ss:

I, Earl Dawson, County Clerk within and for the County and State aforesaid, do hereby certify that the annexed and going type written sheets contains a true and correct copy of the Articles of Agreement and Incorporation of Citizens Gas Company, as the same now appears of record of incor-

porated companies "L" pages 164, 165, 166 and 167 inclusive.

In testimony whereof I have hereunto set my hand — affixed the seal of said office, this 2nd day of May, 1929.

Earl Dawson, Clerk. (Seal.)

DEFENDANT'S EXHIBIT 2

Contract

This Agreement, made and entered into this 6th day of October, 1923, by and between S. H. Hale, first party, and the Harding Glass Company, a corporation doing business in Fort Smith, Arkansas, second, Witnesseth:

That, whereas, first party is an individual engaged in the production and sale of natural gas for profit, and desires to enter into a contract with second party to supply all of the requirements of gas for fuel of the two Harding Glass plants located at Fort Smith, Arkansas, the expense, responsibility and arrangements for the transportation by said [fol. 232] first party of the gas to be used by second party being fully assumed by first party, and same in harmony with the state laws for "carriers" of such production of gas by individual producers of gas, and second party is desirous of buying from first party all of the requirements of said glass plants of gas for fuel for operating said glass plants, under these arrangements; and

Whereas, first party secures his supply of gas from his own wells and those of any other individuals or companies with whom he has or may make contracts during the life of this contract, from the Williams, Kibler, and Alma Gas fields, and also expects to obtain an additional supply from other gas fields, in Crawford County, Arkansas, and vicinity, and intends to supply the second party with gas secured from these sources:

Now therefore, in consideration of the mutual covenants herein contained, first party hereby agrees to sell natural gas to second party, and second party agrees to purchase said gas from first party, upon the terms and conditions hereinafter set forth, to-wit:

1. First party agrees to sell gas to second party at said glass plants (Not to exceed 3,000,000 cubic feet per day),

and second party covenants and agrees to purchase and take gas from first party at said plants for all of the requirements of said plants for fuel, for the sum and price of ten cents per thousand cubic feet, for a period of five years from October 30, 1923, provided first party furnishes the same as hereinafter provided.

2. First party and his representatives shall at all times have access to the premises where the meter, recording gage, regulator, etc. are located, to read and inspect the same and to inspect the other apparatus used in connection therewith, and the second party shall have the same rights, but under no circumstances shall either party, or the representatives of either party, carry or introduce any lights or fires of any kind or character, except electric lights, in or about said meter or apparatus. Second party agrees to give prompt notice to first party of any and all leaks as soon after the same have come to its notice as it conveniently can.

3. It is further mutually agreed that the gas to be supplied hereunder shall be measured on the basis of an eight-ounce pressure by orifice or proportional meter or meters set by first party, and computed according to standard tables, and that if it is used by second party at a greater [fol. 233] pressure, that the multiple ordinarily used in computing the flow of gas at a higher pressure than eight ounces shall be applied and the consumption of gas determined and paid for accordingly, and the first party shall at no time be required to furnish gas hereunder at a greater pressure than twenty pounds.

4. Each of the parties hereto shall have the right to have the meter or meters through which such gas is measured, tested at the expense of the party so desiring the test thereof, at any time, provided at least twenty-fours hours notice of such desire and test shall be given in writing to the other party hereto, and such test shall be made in the presence of representatives of both parties.

5. It is further mutually agreed by the parties hereto that the second party shall pay the first party on or before the 10th day of each calendar month, succeeding the month in which gas is sold to him as herein provided, the amount

shown to be due for all gas furnished during the preceding calendar month, and that in the event the second party shall be in default for a period of ten days after written notice given by first party, in the payment for said gas so sold and furnished as hereinabove set out, this contract, at the option of first party, shall become null and void, and first party shall also in the event of such default have the right to discontinue gas service to second party hereunder. The termination of this contract or ceasing to furnish gas hereunder for this or any cause herein provided shall not release second party from its obligation to pay for gas already furnished to second party by first party hereunder.

6. First party does not guarantee absolutely to furnish to second party the gas or amount of gas herein contracted for, beyond the extent that the wells of said S. H. Hale and the wells of other gas producers from which first party may purchase gas will enable first party to do so. It is understood that no preference in the furnishing of gas is given to second party by this contract, but that first party will, in the event of a shortage of gas sufficient to supply all his customers, pro rate the gas available, nearly as may be, proportionately among his industrial consumers, upon their written request, according to the amount of their requirements. And it is agreed that first party shall not be held responsible in damages or otherwise for any shortage or failure to furnish gas when the same is caused by the failure of his supply in the field from which he obtains the gas reasonably accessible to the main pipe lines which first party employs or hires for the transportation of gas for the service herein, and either party shall be liable for [fol. 234] failure to furnish or take gas caused by breaks in the lines, explosions, strikes, fires, floods, injunctions or orders of courts or other governmental bodies, or other like or different accidents or causes beyond first or second party's control; provided, however, that first party will at all times in good faith use his best efforts to procure said gas from the leases and holdings under his control or from parties from whom he has or may make contracts to buy gas to fulfil this contract, in the field or fields within a reasonable distance from the trunk pipe lines used for transporting gas for this service.

7. This contract and all rights accruing thereunder may be assigned by either of the parties hereto. This contract and each and all of the provisions hereof shall extend to and be binding upon the heirs, successors, representatives, and assigns of the parties hereto.

In witness whereof S. H. Hale, first party, has hereunto set his hand, and the Harding Glass Company, second party, has caused these presents to be signed by its duly authorized officers and its corporate seal to be hereto affixed, by order of its board of directors, the day and year first above written.

(Signed) S. H. Hale, First Party. The Harding Glass Company, (Signed) by C. H. Harding, President, Second Party.

Attest: (Signed) W. E. Harding, Secretary. (Seal)"

IN UNITED STATES DISTRICT COURT

ORDER APPROVING STATEMENT OF EVIDENCE

Comes now the defendant, the Harding Glass Company, appellant in the Court of Appeals, and requests this court to approve the evidence in this cause as set forth above. A part of said evidence, as shown above, is presented in narrative form and a part in the exact words of the witnesses.

The said evidence which is above set out is, therefore, approved, and the undersigned, as United States District Judge who tried this cause, hereby directs that said evidence as above set forth be, and the same is hereby approved. The above and foregoing statement of the evidence [fol. 235] is, therefore, by the court certified to, and approved, as being all of the evidence in said cause and as being a correct statement of all of the evidence introduced by both parties in said cause.

It is, therefore, by the court ordered and directed that said statement of the evidence be, and the same is hereby approved and made a part of the record herein, and it is further ordered that said statement of the evidence be in-

cluded in the transcript of the record for the Court of Appeals of the *Appeals of the* Eighth Circuit.

July 19, 1929.

Frank A. Youmans, United States District Judge.

IN UNITED STATES DISTRICT COURT

PETITION FOR APPEAL—Filed July 10, 1929

To the Honorable Circuit Court of Appeals for the Eighth Circuit and to the Judges thereof:

Comes now the Harding Glass Company and prays an appeal from the judgment, decree and final order of the District Court of the United States for the Western District of Arkansas, Fort Smith Division, and respectfully represents and shows to the court as follows:

The evidence in this cause was taken in open court and the cause submitted to the court regularly and a final decree was entered in this cause on July 2, 1929. On said 2nd day of July, 1929, being regular day of the said United States District Court for the Western District of Arkansas, Fort Smith Division, the said District Court by a final decree permanently enjoined this appellant, the Harding Glass Company, from taking any of its requirements of natural gas from any other person, firm or corporation other than the Twin City Pipe Line Company so long as that company could adequately supply the requirements of the Harding Glass Company; and said court further ordered and required the Harding Glass Company to take all of its requirements of natural gas for its plants in the city of Fort Smith, Arkansas, from the Twin City Pipe Line Company so long as the Twin City Pipe Line Company can adequately supply such requirements and to carry out and specifically perform the written contract entered into between the plaintiffs in the court below and this appellant, which contract bears date August 30, 1926 and which is set out in full in the complaint. This appellant saved due [fol. 236] exception to the order and final decree of said court in granting the relief to the appellees.

This appellant further states and alleges that the Honorable District Court herein erred in rendering said final decree, and said errors of the said District Court are set forth in the assignment of errors, which assignment is

herewith filed and made a part of this application and prayer for an appeal. For the reasons set forth in said assignment of errors, this appellant alleges that the Honorable District Court below committed manifest error and that said error has intervened to the great damage and injury to this petitioner and appellant as herein stated and as set forth in the assignment of errors.

This appellant further states that the granting of the permanent injunction herein and the carrying out of said final decree will work an injury and an injustice to this petitioner and appellant and will destroy valuable property rights of this appellant. This appellant therefore appeals to this court, being the Court so authorized, to exercise its discretion in the granting of a supersedeas, and prays this Court to suspend the effect of the permanent injunction granted by the final decree herein until the appeal of this appellant may be heard and determined in the Court of Appeals of the Eighth Circuit. This appellant respectfully alleges that no harm can come to the appellees in thus suspending said injunction by giving a right to this appellant to supersede said injunction and final decree.

Wherefore, this petitioner prays this Honorable Court to make an order as authorized by Equity Rule 74 suspending said permanent injunction during the pendency of this appeal, upon such terms and conditions as may to this Court seem just, and that this Court thereupon issue a writ of supersedeas staying and suspending the carrying out of said final decree until the hearing and decision of this cause by the Circuit Court of Appeals herein. The appellant therefore offers with this prayer for appeal to make any reasonable supersedeas bond which may be required by this Court and conditioned as the Court may require.

This appellant further prays that its appeal herein be granted, and that this cause be heard and reviewed by the Circuit Court of Appeals of the Eighth Circuit, and that the decree of the District Court in this cause be reversed [fol. 237] with directions to said District Court to enter a decree in favor of this appellant.

Harding Glass Company, by Joseph R. Brown.
James B. McDonough, Its Counsel.

Duly sworn to by W. E. Harding. Jurat omitted in printing.

In United States District Court

Assignment of Errors—Filed July 10, 1929

Comes now the appellant and petitioner, the Harding Glass Company, which said company was the defendant in the United States District Court for the Western District of Arkansas, Fort Smith Division, in Case No. 476, in which cause the appellees, the Twin City Pipe Line Company and the Industrial Oil & Gas Company, were plaintiffs; and this appellant, in connection with its petition and prayer for an appeal, says that in the record and proceedings and in the final decree in this cause manifest error has intervened to the prejudice of this appellant, in that the Court below entered a final decree compelling and requiring this [fol. 238] appellant specifically to perform the contract set forth in the complaint of the plaintiffs in the Court below. This appellant states that the suit in the Court below was brought by said appellees above named to compel the specific performance of an alleged contract between the appellees and this appellant, wherein it was claimed that this appellant had obligated itself to take from the appellees all the appellant's requirements of gas.

This appellant therefore alleges and states that the District Court below committed error in rendering said final decree, and this appellant therefore assigns the following as errors, to reverse this appeal is brought, to-wit:

I

The court below erred in holding that the Twin City Pipe Line Company, being a public service corporation, had the power to make an exclusive contract obligating this appellant, the Harding Glass Company, to take all its requirements from the appellees.

II

The Court below erred in holding that said contract was not invalid because in restraint of trade.

III

The Court below erred in holding that said contract was not invalid because against public policy.

IV

The Court below erred in refusing to hold that said contract was invalid because it amounts to a discrimination by a public utility.

V

The Court below erred in holding that there was mutuality in said contract, and in refusing to hold that said contract was invalid because it lacked mutuality.

VI

The Court below erred in refusing to hold that there was no mutuality of obligation in said contract.

VII

The Court below erred in holding that said contract could be specifically performed.

[fol. 239]

VIII

The Court below erred in refusing to hold that said contract could not be specifically performed because the same was too indefinite in time and too uncertain to be capable of specific performance.

IX

The Court below erred in granting the injunction prayed for in the complaint.

X

The Court below erred in not transferring the case to the law side of the docket.

XI

The Court erred in holding that the appellees did not have a complete remedy at law.

Wherefore the appellant, the Harding Glass Company, prays that the decree of the District Court of the United States for the Western District of Arkansas, Fort Smith Division, shall be reversed, and that the injunction granted

by the Court below shall be dissolved, and the cause remanded to the lower Court with directions by this Court to dismiss the said alleged cause of action for want of equity and for the reasons set forth in this assignment of errors, and for all other and further relief.

Joseph R. Brown, James B. McDonough, Counsel for Appellant.

In United States District Court

Order Allowing Appeal—July 10, 1929

On this 10th day of July, 1929, on presentation of the above and foregoing petition of the Harding Glass Company for an appeal in the above entitled cause, in which petition said Harding Glass Company asks that the permanent injunction granted by the final decree be suspended during the pendency of the appeal upon such terms and conditions as may to this Court seem just, and in which said Harding Glass Company offers to make any reasonable supersedeas bond which may be required by the Court.

And it appearing that said suspension should only be granted upon the giving of an adequate bond which will fully protect plaintiffs in the event said decree is affirmed: [fol. 240] And it appearing that this cause may not be finally disposed of on appeal for more than a year, that the annual requirements of gas of the Harding Glass Company have varied from 592,000,000 cubic feet per year to 776,000,000 cubic feet per year, and that in the event that injunction is suspended and the defendant is permitted to take its gas elsewhere, pending the appeal, the plaintiffs will suffer damages of at least five cents per thousand cubic feet for such gas purchased elsewhere, in the event said decree is affirmed:

It is Ordered that said appeal is granted, and it is further ordered that the permanent injunction is suspended during the pendency of this appeal upon conditions that Harding Glass Company makes and files a supersedeas bond and cost bond with good and sufficient surety in the sum of Twenty Thousand ($20,000.00) Dollars, which in addition to the usual conditions required by law shall provide:

(1) That upon affirmance of the decree of injunction the Harding Glass Company will pay to the plaintiffs, Twin City Pipe Line Company and Industrial Oil & Gas Company, five cents per thousand cubic feet for all gas taken by the Harding Glass Company from any person, firm or corporation other than the Twin City Pipe Line Company.

And such bond being tendered with the American Surety Company of New York as surety, it is further ordered, adjudged and decreed that said supersedeas bond and cost bond be and the same is hereby approved, and that the appeal of the Harding Glass Company be and the same is hereby granted, and that the assignment of errors is hereby permitted to be filed and made a part of the record herein. It is further ordered, as a condition of the supersedeas, that the appellees shall have the right by a proper petition in the Court of Appeals of the Eighth Circuit to have the amount of the bond herein increased by a proper order of the said Circuit Court of Appeals.

It is further ordered that the appellant shall have thirty (30) days from this date within which to prepare and present for written approval of this court the statement of the evidence.

Frank A. Youmans, District Judge.

[fol. 241] Supersedeas bond on appeal for $20,000, approved July 10, 1929, omitted in printing.

[fol. 242] IN UNITED STATES DISTRICT COURT

OPINION—Filed July 2, 1929

On the 13th of July, 1926, a decree was entered in this court in the consolidated cases of Harding Glass Company vs. Twin City Pipe Line Company, Industrial Oil & Gas Company, S. H. Hale and Fort Smith Light & Traction Company, The Twin City Pipe Line Company vs. Harding Glass Company, and the Twin City Pipe Line Company vs. Harding Glass Company, being three cases.

That decree adjudicated the issues in those three cases. Both the Twin City Pipe Line Company and the Harding

Glass Company, excepted to portions of the decree and an appeal was taken by each one. The Industrial Oil & Gas [fol. 243] Company, and between the Twin City Pipe Line Company also took an appeal as I remember it. Afterwards on the 30th day of August, 1926, a contract was entered into between the Twin City Pipe Line Company and the Industrial Oil & Gas Company on the one hand, and the Harding Glass Company on the other. By the conditions of that contract the judgments rendered on the 13th day of July, 1926, were satisfied and canceled. The former contracts existing between Hale and the Harding Glass Company, and between the Industrial Oil & Gas Company and the Harding Glass Company, and between the Twin City Pipe Line Company and the Harding Glass Company were abrogated as of September 1, 1926. That contract also provided that suits and appeals then pending between either of the parties or S. H. Hale, should be dismissed. It also provided that the Twin City Pipe Line Company should lay an eight inch pipe line from a connection with its ten inch line at or near what is known as the car barn to a connection with its eight inch line on Sixth Street near its regular station. It also provided in that contract that the Harding Glass Company should take all its requirements of gas for its plants in the city of Fort Smith from the Twin City Pipe Line Company so long as the Twin City Pipe Line Company can adequately supply its requirements. It also provided, or rather it was agreed between the parties that in the event there was a shortage of gas, not enough adequately to supply the domestic consumers that the Twin City Pipe Line Company may discontinue selling defendants gas and upon condition that the same character of service was to be given the Harding Glass Company that was given to other industries in the city of Fort Smith. The parties operated under that agreement, that is, under the agreement of the 30th day of August, 1926, until about the time of the bringing of this suit by the Twin City Pipe Line Company and the Industrial Oil & Gas Company. This suit was brought on June 4, 1928. The bill of the Twin City Pipe Line Company and the Industrial Oil & Gas Company alleges that the Harding Glass Company threatens and is about to discontinue taking gas under the contract of the 30th of August, 1926, and that it was threatening to take its gas requirements from another corporation. This is a suit

based upon the contract of the 30th of August, 1926, alleging that the Harding Glass Company was violating the terms of that contract, or about to do so, and asking for an injunction against such violation. A temporary restraining order was first asked for, and that upon the final hearing the said [fol. 244] Harding Glass Company be required to specifically perform its contract. The matter of a temporary restraining order was not pressed. The case was heard on final hearing and this is a decision upon that hearing. There was a denial in the answer of the allegations of the complaint generally, and then there were specific defenses set up alleging the invalidity of the contract itself. Generally the contract was stated by the defendant to be invalid by means of nine separate matters.

They read as follows:

1. The plaintiff had no power under Arkansas law to make an exclusive contract obligating the Harding Glass Company, a customer, to take all its requirements.

2. The contract as to the exclusive clause is invalid because in restraint of trade.

3. The contract in invalid because it is against public policy and tends to establish a monopoly.

4. The contract is invalid because it amounts to a discrimination by a public utility corporation.

5. The contract is invalid because it lacks mutuality.

6. There already existed a duty upon the Twin City to build the service pipe lines which it built.

7. There is no mutuality of obligation in this contract.

8. Such a contract will not be specifically performed by the court because too indefinite in time.

The first two I regard as duplication, that is, the plaintiff has no power under the Arkansas law to make an exclusive contract; second, that the contract as to the exclusive clause is invalid because in restraint of trade. I do not think that this contract can be said, or can be held to be invalid by reason of an exclusive clause, that exclusive clause being that clause by which the Harding Glass Company agreed to take gas for its requirements from the Twin City Pipe Line Company, and an agreement on the part of the Twin City

Pipe Line Company to furnish gas for the requirements of the Harding Glass Company. I do not think that the contract was in restraint of trade. If, however, it could be said to have had such an effect, it was only a partial restraint of trade. In the case of Fort Smith Light & Traction Company vs. Kelley, 194 Ark. 461, which was a case in some of its aspects similar to the one at bar, the Supreme Court said:

[fol. 245] "That courts of chancery will grant relief by injunction to prevent a breach of contract in partial restraint of trade is well settled." Citing Webster vs. Williams 62 Ark. 101; High on Injunction Section 1167.

Quotation is made from High on Injunction as follows:

"The jurisdiction in cases of this nature is based upon the ground that the parties cannot be placed in status quo, and that damages at law can afford no adequate compensation, the injury being a continuous one and irreparable by the ordinary process of courts of law:"

Then the court proceeds to say:

"If equity will enjoin a breach of contracts of this character that are in partial restraint of trade, a fortiori will it prevent a breach of such contracts that contain no restraint whatever."

The decree of the lower court in that case was reversed, and Kelley was restrained from undertaking to sell gas in the City of Fort Smith, which, in the contract with the Fort Smith Light & Traction Company, had been sold to it, for such a purpose. Insofar as the answer sets up an alleged illegality by reason of the contract in suit being against public policy and tending to establish a monopoly, I do not think that the authorities bear that out. Nor do I think it can be held to be invalid because of discrimination by a public utility corporation, nor can it be said to lack mutuality. The defendant contends that the pipe line put in by the Twin City Pipe Line Company pursuant to the contract in suit was one which the Twin City Pipe Line Company was compelled to do by virtue of being a public utility and for that reason cannot claim that as a factor in the contract. In the suit which terminated on the 13th day of July, 1926, that very matter was involved and it was adjudged or

held in the courts of that suit that the Twin City Pipe Line Company was not required to put in that particular line stipulated for in contract of the 30th of August, 1926. It appears that the Pipe line was put in at a cost of some $4,000.00; that the Industrial Oil & Gas Company which is a producing company, and which is not a public utility, had expended large sums of money in making further explorations for gas and obtaining gas. There was no dispute of the testimony on those points. The testimony of Mr. Harding, the President of the Harding Glass Company, itself negatives any violation of the contract on the part of the plaintiff. In the course of his cross-examination Mr. Harding was asked this question: "I ask you if there was [fol. 246] ever a day since the contract was signed that you have not gotten an adequate supply of gas?" He answered as follows: "I do not think that there has been a day." So that the contract appears to have been fully performed and was being performed at the time this suit was brought, and Mr. Harding admitted that he was taking gas from the Citizens Pipe Line Company for all of the requirements of his plant, and that it resorted at times to the pipe lines of the Twin City in cases in which there was a suspension on the part of the Citizens Pipe Line Company. As a matter of fact, he was changing the terms of the contract so that the Harding Glass Company was taking all of its requirements if those requirements could be supplied by the Citizens Pipe Line Company, and was resorting to the Twin City Pipe Line Company gas only when there was a failure in the delivery of the Citizens Pipe Line Company. I think there is no question of mutuality. That is discussed in cases that I will refer to here and seems to be fully settled. The only point left is that with reference to the specific performance of a contract, or the decreasing of specific performance of a contract by means of injunction. Now I think that question has been fully settled in three jurisdictions. First, in the State of Arkansas, Second, in the Fifth Circuit and Third, in the Eighth Circuit. In the case of McConnell vs. Arkansas Brick & Manufacturing Co. which was a suit in the lower court to enjoin McConnell as superintendent, and other persons as members of the Board of Penitentiary Commissioners against violating a certain alleged contract. That Board passed a certain resolution declaring that certain contracts were illegal, and this suit

was brought by the Arkansas Brick & Manufacturing Company to enjoin them from desisting from their purposes of discontinuing their contract, and even went further. The prayer of that bill was as follows:

"The premises considered the plaintiff prays that a temporary restraining order be issued restraining the defendants and each of them from taking any action to prevent the due performance of said contracts, or towards restriction thereof, and particularly from taking from the plaintiff's works any of the men now engaged in labor therein; and requiring defendant McConnell, as superintendent of the penitentiary, to proceed with the execution of said contracts and the furnishing of labor therein agreed upon. And plaintiff prays that, upon a final hearing, a decree be entered as above prayed, and that the said order of the board cancelling the contract be declared null and void."

[fol. 247] Now there was a demurrer to that bill and it was overruled, and the decree was entered upon the decision of the penitentiary board to stand on the demurrer. Then this decree was entered:

"Thereupon, being well and sufficiently advised as to all matters of fact and law arising herein, as shown by the complaint and confessed by the demurrer, this court doth order, adjudge and decree that the resolution passed by the board of commissioners for the management of the state penitentiary of the state of Arkansas, on the 13th day of August, 1901, attempting to cancel and annul the contract purporting to have been made by and between the parties to this litigation and filed as an exhibit to the complaint, be, and the same is hereby cancelled and held for naught. That the defendants, Jefferson Davis, J. W. Crockett, T. C. Monroe, George W. Murphy and Frank Hill, as members of said board of commissioners, be, and they are hereby, enjoined and restrained from in any manner cancelling or annulling said purported contract, without sufficient cause being shown therefor. That the defendant, H. T. McConnell, as superintendent and keeper of the Arkansas penitentiary, and M. D. L. Cook, as financial agent of said penitentiary, be, and they are hereby enjoined and restrained from executing and carrying into effect the said resolution of the said board of commissioners, passed as aforesaid; and that they,

together with the said members of the board of commissioners, be, and they are hereby, enjoined and restrained from refusing and failing to execute and carry out the terms of said purported contract until its illegality or invalidity as a contract shall be adjudged and declared, by some tribunal vested by law with jurisdiction and authority, to be illegal and invalid."

Now there was decreed specific performance by injunction in that case. The question came up in the Fifth Circuit in the case of Montgomery Light & Power Co. vs. Montgomery Light & Traction Company, in which there was a contract between the two parties by which the defendant was to take electricity from the plaintiff. It did so for a time under that contract and finally refused to take further electricity, and this suit was brought. The decision was by District Judge Jones, reported in 191 Fed. 657 on a demurrer to the complaint. In that case in that decision Judge Jones decided as I think, every question that is raised by the defendant in this case,—in the case at bar. On the hearing Judge Clayton decided the same questions in the same way they had been decided by Judge Jones. An appeal was taken to the Court of Appeals. The decisions were sus-
[fol. 248] tained in that court and afterwards a writ of certiorari was denied by the Supreme Court. Now every phase of the question was gone into in those cases, in those decisions. Now the same question came up in the Court of Appeals for the Eighth Circuit in the case of Texas Company vs. Central Fuel & Oil Co. reported in 194 Fed. page 1. That opinion was rendered by Judge Trieber. He went into the question of specific performance by injunction and held that that was a proper remedy in this particular case, in which the Texas Oil [Oil] Company had entered into a contract with the Central Fuel Oil Company by which the Central Fuel Oil Company had agreed to transport its oil through the pipe lines of the Texas Company, and then after the Texas Company had prepared itself for the performance of the contract, and had performed up to the time of the suit, or about that time, the Central Fuel Oil Company refused to deliver oil to the Texas Oil Company. The demurrer to the bill had been sustained in the lower court. That decision was reversed by the court of appeals in the opinion prepared by Judge Trieber. Now there is a still

later case. It is that of the National Marketing Machine Co. vs. Triumph Machine Company. That was decided on May 10, 1926, in an opinion prepared by Judge Sanborn, Circuit Judge. That arose in a patent case. There had been litigation between the parties and after that litigation was terminated they had entered into a certain agreement and the Triumph Machine Company was to manufacture certain machines, and they were to be sold by the National Marketing Machine Company. That had gone on for five years and then the Triumph Machine Company refused to deliver any more machines to the plaintiff. Suit was brought in the Western District of Missouri to compel specific performance by injunction. A demurrer was sustained to that bill and in the Court of Appeals opinion Judge Sanborn said (the case is reported in 13 Fed. 2d, page 6):

"There are some principles, rules and practices in equity established beyond debate or the necessity for the citation of authority, and among them are these:

First. The owner of a patent, who has secured in a litigated case a final decree against an infringer that he has the exclusive, separable rights (a) to manufacture, (b) to use, and (c) to sell the infringing machine, and the devices and inventions embodied therein and in like machines, is entitled to an injunction to prevent the infringer from mak- [fol. 249] ing, using, or selling the infringing machine, or any of those rights.

Second. A party to a contract, who has continually performed his part thereof, and is ready and willing to complete his performance, is entitled to a decree of specific performance thereof by his contractee, who has failed or is failing to perform his part thereof, unless the contractor has an adequate remedy at law for the contractee's breach. (Citing authorities).

Third. The adequate remedy at law, which will preclude the grant of specific performance of a contract by a court of equity, must be as certain, prompt, complete, and efficient to attain the ends of justice as a decree of specific performance. (Citing cases). The facts of this case leave no doubt that the plaintiff has no such remedy at law.

Fourth. An injunction against the breach or the continuance of a breach of a contract is a negative decree of specific

performance, and the power and duty of a court of equity to grant such an injunction is even greater, under the rules, principles, and practices in equity, than its power and duty to grant decrees of specific performance. A court of equity may issue its injunction to prevent a violation, or the continuance of a violation, of a contract in cases in which it would not decree specific performance thereof." Citing authorities, and among them being this case of Texas Company vs. Central Fuel Oil Company.

On the authority of these cases which I have cited, which I think are particularly in point, the prayer of the bill is granted.

Frank A. Youmans, Judge.

IN UNITED STATES DISTRICT COURT

PRÆCIPE OF HARDING GLASS COMPANY FOR TRANSCRIPT—Filed July 23, 1929

To William S. Wellshear, Clerk:

In making the transcript in the above entitled cause, you will please include in said transcript the following:

(1) The original complaint with exhibits, if any, to said complaint.

(2) The answer of the Harding Glass Company.

[fols. 250 & 251] (3) Motion of Harding Glass Company to dismiss.

(4) Motion of Harding Glass Company to transfer to law.

(5) Motion of Harding Glass Company to dismiss because S. H. Hale is not made a party defendant.

(6) Final decree entered July 2, 1929.

(7) Petition of Harding Glass Company for appeal.

(8) Order of court allowing appeal.

(9) Supersedeas and cost bond, and order approving the same.

(10) Assignment of errors of the Harding Glass Company.

(11) The statement of the evidence approved by the District Court, showing the date of the approval of said evidence and the date of the filing of the same.

(12) Opinion of the court given at the date of the final decree. Said opinion was given orally and taken down in shorthand and afterwards filed. This præcipe includes said opinion because the appellees' counsel have requested appellant's counsel to include said opinion in the præcipe.

(13) A copy of this præcipe, showing service thereof upon the appellees.

Joseph R. Brown, James B. McDonough, Attorneys for Harding Glass Co.

Service of copy of the above præcipe is hereby acknowledged this 22nd day of July, 1929.

Harry P. Daily, Counsel for Appellees.

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 252] Appearances of counsel omitted in printing.

[fol. 253] Minute entries of argument and submission omitted in printing.

[fol. 254] IN UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT, NOVEMBER TERM, A. D. 1929

No. 8686

HARDING GLASS COMPANY, Appellant,

vs.

TWIN CITY PIPE LINE COMPANY et al., Appellees

Appeal from the District Court of the United States for the Western District of Arkansas

Mr. Joseph R. Brown and Mr. James B. McDonough for appellant.

Mr. Harry P. Daily (Mr. Vincent M. Miles and Mr. John P. Woods were with him on the brief), for appellees.

Before Van Valkenburgh and Gardner, Circuit Judges, and Munger, District Judge

OPINION—Filed Mar. 8, 1930

MUNGER, District Judge, delivered the opinion of the court.

The Twin City Pipe Line Company brought suit to compel the Harding Glass Company to perform a contract, and obtained a decree. The Glass Company has appealed. The principal question involved is whether the contract is so illegal that the court will not aid in its enforcement. The Glass Company has a factory at Fort Smith, Arkansas, and uses a large amount of gas in the manufacture of its products. The Pipe Line Company is a public utility corporation which supplies gas from natural gas fields to Fort Smith, where it sells the gas to industries, and to a company which supplies domestic consumers. Litigation had oc- [fol. 255] curred between the Glass Company and the Pipe Line Company and others over contracts for the supply of gas to the Glass Company. A compromise was reached and a contract was made dismissing the pending legal proceedings and providing that the Pipe Line Company should lay a larger pipe to supply the Glass Company, and in this contract were the following provisions:

"The Harding Glass Company agrees to take all its requirements of gas for its plants in the City of Ft. Smith, Arkansas, from the Twin City Pipe Line Company so long as the Twin City Pipe Line Company can adequately supply its requirements and to pay for all gas furnished it hereunder, beginning September 1, 1926, at the regular sliding schedule of rates of twelve cents to fifteen cents, which is the rate now in effect for industries in the City of Fort Smith, Arkansas, or at such rate as may hereafter be fixed for industries in the City of Fort Smith by the proper regulatory body or Court having jurisdiction. All gas consumed by the Harding Glass Company up to September 1, 1926, shall be paid for at the rate of ten cents per thousand cubic feet.

The Harding Glass Company agrees that in the event there is a shortage of gas so that there is not enough to

adequately supply the domestic consumer, that the Twin City Pipe Line Company may discontinue serving it gas, upon condition that the same character of service be given the Harding Glass Company that is given other industries in the City of Fort Smith, Arkansas, and that his gas service be not discontinued unless that of other like industries is discontinued also."

The Glass Company thereafter took its requirements of gas from the supply furnished by the Pipe Line Company for several years, but it then made preparations to take its supply of gas from another corporation which had a franchise permitting it to lay pipe line to the factory of the Glass Company. Upon proof of these facts, a decree was entered ordering the Glass Company to take all of its requirements of natural gas from the Pipe Line Company so long as it could adequately supply its needs, and to specifically perform the contract. The decree also enjoined the Glass Company from taking any of its requirements of gas from any other person or company so long as the Pipe Line Company could adequately supply its needs.

[fol. 256] Appellant Glass Company asserts that the portion of the contract which requires it to take all of its requirements of gas exclusively from the Pipe Line Company is illegal and contrary to public policy because it is in restraint of trade, tends to the monopolization at Fort Smith of the sale of gas by the Pipe Line Company, and is an undue restraint of business competition between companies supplying gas. It is to be observed that the contract obligates the Glass Company to take the gas without any limit of time, unless one of the conditions of the contract arises. It appears that the Glass Company is the largest consumer of gas among the industries of Fort Smith. The public policy to be ascertained is the public policy of Arkansas. Northwestern Life Ins. Co. v. Johnson, 254 U. S. 96, 100; Whitfield v. Ætna Life Ins. Co., 205 U. S. 489, 495; McCue v. Northwestern Mut. Life Ins. Co., 167 Fed. 435, 442. It is only in clear cases that a contract will be declared illegal because of public policy. Steele v. Drummond, 275 U. S. 199, 205. The character and tendency of the contract is to be considered, rather than the good intentions of the parties, or the absence of actual injury. McMullen v. Hoffman, 174 U. S. 639, 647; Greenhood on Public Policy 5;

Gibbs v. Smith, 115 Mass. 592, 593; United States v. E. C. Knight Company, 156 U. S. 1, 16; Weil v. Neary, 278 U. S. 160, 173. The constitution of Arkansas (Art 11, Sec. 19) contains this provision: "Perpetuities and monopolies are contrary to the genius of a republic and shall not be allowed." No specific determination is found in the statutes or decisions of the Supreme Court of Arkansas applicable to the exact situation. That court has decided many questions involving alleged restraints of trade, (See Woodruff v. Berry, 40 Ark. 251; Webster v. Williams, 62 Ark. 101, 34 S. W. 537; Shapard v. Lesser, 127 Ark. 590, 193 S. W. 262; Wakenight v. Spear & Rogers, 147 Ark. 342, 227 S. W. 419) in recognition of the common law principles applicable. It is apparent from the record in this case that there were several companies which had authority to sell gas to the appellant. It is conceivable that other companies may come into existence able to supply the appellant's needs. One such company is ready to sell appellant its requirements. Is the contract valid by which the Glass Company agreed to buy exclusively from the Pipe Line Company, so long as it could supply its needs? In Coombs v. Burk, 40 Calif. App. 8, 10, 180 Pac. 59, the question was presented of the validity [fol. 257] of a contract whereby a customer of a gas company agreed to purchase all the gas which he might use. In that case the Court said:

"Whatever tends to prevent competition in business impressed with a public character is opposed to public policy and is therefore unlawful. Greenhood on Public Policy, p. 180.

"Where a contract affects such character of business, since no restraint, however partial, can be tolerated, the court will not inquire into or consider the extent of the restriction imposed. Gibbs v. Consolidated Gas Co., 130 U. S. 396, 9 Sup. Ct. 553, 32 L. Ed. 979; West Va. T. Co. v. Ohio R. P. L. Co., 22 W. Va. 600, 46 Am. Rep. 527; Gwynn v. Telephone Co., 69 S. C. 434, 48 S. E. 460, 67 L. R. A. 111, 104 Am. St. Rep. 819; Salt Co. v. Guthrie, 35 Oh. St. 672. As to private business, the conduct of which does not affect the public welfare, and hence involves no question of public policy, a different rule applies, under which contracts, if reasonable in their terms, will be enforced.

"(2) Concededly in the instant case the Gas Corporation was engaged in a business impressed with a public character (Gibbs v. Cons. Gas Co., supra), and from a reading of the contract it is apparent that its purpose in making the same was to prevent defendant from discontinuing the use of gas furnished by it, and, in lieu thereof, obtaining a supply from another company engaged in supplying gas to the inhabitants of the city. That the contract was not only in restraint of trade, but if upheld would tend to stifle competition and give plaintiff's assignor a monopoly of the business of furnishing a supply of gas in the city, and hence be detrimental to the public welfare, admits of no controversy."

In Perceval v. Public Service Commission, 163 App. Div. 705, 707, 148 N. Y. Supp. 583, a public utility company supplying electric current required of those who sought to become its customers an agreement that they should take no electric current from any other company. In awarding a writ compelling the company to supply the needs of an applicant for service, although he also proposed to take electric current at the same place from another company, the Court said:

[fol. 258] "It is of course the rule that such a corporation may establish reasonable regulations respecting the use of the service which it proposes to furnish and each customer requiring the service is called upon to comply with such regulations. In our opinion, however, the requirement that a consumer must take all of its electricity from one company, or receive none at all, is not in any proper sense a regulation respecting the use of the service, but is a purely arbitrary attempt on the part of the company to insure to itself a monopoly of furnishing electric current. If the company can lawfully decline to furnish any current to the relator because it also proposes to obtain electricity from a neighbor (not a competing company) it can equally well refuse electrical current to a consumer who himself generates a part of the current which he uses. Such a limitation upon the company's obligation would, as it seems to us, be quite unreasonable. An exclusive clause similar in purport and intention to the one insisted upon by the defendant company was severely condemned upon

grounds of public policy in Central New York Tel. & Tel. Co. v. Averill. * * * To sum up our conclusions we are of opinion that the company's reasons for refusing to furnish electrical current to the relator are untenable, and that the restrictive clause which it insists in inserting in its contracts, and to which relator objects, is contrary to public policy and invalid, and constitutes in no proper sense a reasonable regulation respecting the use of the service which relator demands."

In Central New York Telephone & Telegraph Co. v. Averill, 199 N. Y. 128, 139, 92 N. E. 206, referred to by the Court in the last case cited, an agreement had been made by the proprietors of a hotel with a telephone company, by the terms of which it was provided that no other telephone instruments or wires should be maintained in the hotel. In holding that the contract was invalid the Court said:

"If a telephone company may contract for the exclusion of any other telephone service from the premises of its customers, it may thus deprive all those customers of telephone communication with every person who takes telephone service from rival concerns, and thus prevent just what all telephone franchises are designed to promote—that is, the availability to every member of the community who desires it, and can afford to pay for it, of the most extensive telephone service attainable."

[fol. 259] In United States Telephone Co. v. Central Union Telephone Co., 202 Fed. 66, 71, the Court considered a contract between a local telephone company and a long distance telephone company by which the local company agreed to permit no other long distance company to connect with its lines for 99 years. This portion of the contract was held to be against public policy, the Court making the observation:

"The long-distance company not only forestalls competition likely to arise through the extension of the local company's lines, but by its system of these contracts there was a direct plan and effort to monopolize in the long-distance business so much of the field as it could cover. A general system of contracts may be obnoxious to an anti-trust law, though the individual contract would not be. United States

v. Reading Ry., 226 U. S. 324, 33 Sup. Ct. 90, 57 L. Ed. * * * These contracts, therefore, must be condemned because 'adopted for and adapted to' restrain of trade and monopoly, unless they escape that condemnation for the reasons hereafter to be considered."

In Gwynn v. Citizens' Telephone Co., 69 S. C. 434, 443, 48 S. E. 460, an agreement by a customer of a telephone company to install and use exclusively one of the company's phones in his place of business was held invalid because its tendency was to stifle competition between common carriers and to create a monopoly. Contracts between public utility corporations, by which it was agreed that the territory in which they should do business should be divided between them, or that one should not sell to a customer of the other, have been held contrary to public policy because tending to monopolize the business and to suppress competition. Chicago Gas-Light & Coke Co. v. People's Gas-Light & Coke Co., 121 Ill. 530, 545, 13 N. E. 169; Charleston Nat. G. Co. v. Kanawha Nat. G. L. & F. Co., 58 W. Va. 22, 25, 50 S. E. 876; State v. Portland Natural Gas & Oil Co., 153 Ind. 483, 489, 53 N. E. 1089; City of Detroit v. Mutual Gas Co., 43 Mich. 594, 606, 5 N. W. 1039; 1 Wyman on Public Service Corporations, Sec. 693. It is obvious that such companies may divide the field just as effectually, if they may obtain enough exclusive and long enduring contracts from groups of customers, and in addition, may make the field barren for future competitors.

[fol. 260] Somewhat opposed to the line of reasoning presented by the foregoing cases is the case of Bald Eagle Val. R. Co. v. Nittany Val. R. Co., 171 Pa. 284, 299, 33 Atl. 239. A contract between a railway company and an iron company by which the railway company agreed to contribute money to the iron company to develop its ore land, and the iron company agreed to give all its traffic to the railway company was held valid. The Court said:

"Is a contract by a railroad company with an iron company, in which the former contributes a large sum of money to the latter for development, and gives to it facilities for transportation, in consideration of which the iron company contracts to give it all its traffic, ultra vires? It is not in restraint of trade, for its express purpose and necessary

effect are to increase both trade and population. Not a single traveler or shipper outside the contracting party is affected in his selection of a route. The contract binds none of them. It is not seldom that those who have reaped benefits from a contract such as this seek to escape its obligations by taking refuge in that assumed turpitude which, on grounds of public policy, avoids the contract; but here—and it is a gratification to us to say it—the parties to this contract violated no law, restrained not others from engaging in business, did nothing of evil example or detrimental to public morals; therefore, there is no public policy which, in the absence of express legislative enactment, makes void this contract."

This decision may be accepted as stating the public policy of Pennsylvania.

The ordinary rule that a contract is not against public policy although one of the parties agrees thereby to deal exclusively with the other (Carter-Crume Co. v. Peurrung, 86 Fed. 439, 440, 13 Corp. Jur. 486) does not necessarily apply in the case of those engaged in a public business, such as supplying gas for public use. A contract by such persons may be invalid even though the restraint of trade is only partial, if it is injurious to the public by tending to prevent competition, or by tending to create a monopoly. Gibbs v. Consolidated Gas Co. of Baltimore, 130 U. S. 396, 408; Union Trust & Savings Bank v. Kinloch Long-Distance Tel. Co., 258 Ill. 202, 101 N. E. 435; Central New York Tel. & Tel. Co. v. Averill, supra; Transportation Co. v. Pipe Line Co., 22 W. Va. 600, 625; Chicago Gas-Light & Coke Co. v. Peoples Gas-Light & Coke Co., supra; Green-[fol. 261] hood on Public Policy, 180; Joyce on Monopolies, Sec. 92; Pond on Public Utilities, Secs. 205, 207; 13 Corp. Jur. 478; 41 Corp. Jur. 153, 157, 160, 161; 3 Williston on Contracts, Sec. 1645.

The monopolization that is condemned is that understood in the modern definition of monopoly, a condition produced by agreement or by acts of individuals, so that a power may exist to control prices or to exclude competition. National Cotton Oil Co. v. Texas, 197 U. S. 115, 129; Standard Oil Co. v. United States, 221 U. S. 1, 57; 41 Corp. Jur. 82; 19 Rul. Cas Law 30. See also Shawnee Compress Co. v.

Anderson, 209 U. S. 423, 435. "The logical effect of all monopolies is an increase of price of the thing produced." Pearsall v. Great Northern Railway Co., 161 U. S. 646, 676.

A dominant question to be considered in each case is whether the contract involved is injurious to the public interest, and each case must be judged by its own circumstances. Considering the very large amount of gas contracted to be sold to the Harding Glass Company, the extended time during which the contract was to be in force, the natural effect of the contract upon competition in furnishing gas service in the locality, the conclusion has been reached that the portion of the contract requiring the Harding Glass Company to buy gas exclusively from the Pipe Line Company must be held to be invalid, as tending to stifle legitimate competition in supplying the needs of consumers of gas in the field of operations of the Pipe Line Company. The aid of the courts will not be granted to enforce such contracts. Oscanyan v. Arms Co., 103 U. S. 261, 267; Gibbs v. Consolidated Gas Co. of Baltimore, 130 U. S. 396, 412; Continental Wall Paper Company v. Voight & Sons Company, 212 U. S. 227, 262. The decree will be reversed, with directions that the plaintiff's bill be dismissed.

[fol. 262] In United States Circuit Court of Appeals, Eighth Circuit

No. 8686

Harding Glass Company, Appellant,

vs.

Twin City Pipe Line Company and Industrial Oil and Gas Company

Appeal from the District Court of the United States for the Western District of Arkansas

Decree—March 8, 1930

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of Arkansas, and was argued by counsel.

On Consideration Whereof, it is now here ordered, adjudged and decreed by this Court, that the decree of the said District Court, in this cause be, and the same is hereby, reversed with costs; and that the Harding Glass Company have and recover against the Twin City Pipe Line Company and Industrial Oil and Gas Company the sum of —— Dollars for its costs in this behalf expended and have execution therefor.

It is further ordered that this cause be, and the same is hereby, remanded to the said District Court with directions to dismiss plaintiff's bill.

[fol. 263] IN UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT

[Title omitted]

PETITION FOR REHEARING—Filed May 6, 1930

Now comes the appellees and file this their petition for a rehearing in the above cause, and for reasons therefor say:

1. This Court, in its opinion has erroneously held that the portion of the contract requiring the Harding Glass Company to buy its requirements of gas for its existing plants from the Twin City Pipe Line Company is contrary to public policy.

2. This Court, in its opinion has erroneously held that the portion of the contract requiring Harding Glass Com-
[fol. 264] pany to buy its requirements of gas for its existing plants from the Twin City Pipe Line Company is contrary to the public policy of Arkansas.

3. This Court, in its opinion has erroneously held that a "requirements contract" is void because in restraint of trade.

Wherefore appellees pray that a rehearing be granted, and that upon such rehearing the decree of the lower court be affirmed.

Harry P. Daily, John P. Woods, Ralph D. Stevenson, Counsel for Appellees.

Certificate of Counsel

Harry P. Daily, one of counsel for Appellees, hereby certifies that the foregoing petition for rehearing is not filed for delay, but in order that justice may be done, and that in his opinion said petition should be granted and the decree of the lower court affirmed.

Harry P. Daily.

[File endorsement omitted.]

[fol. 265] In United States Circuit Court of Appeals

Order Denying Petition for Rehearing—June 26, 1930.

This cause came on this day to be heard upon the petition for a rehearing, filed by Counsel for appellees.

On consideration whereof, it is now here ordered by this Court, that said petition for a rehearing of this cause, be, and the same is hereby, denied.

[fol. 266] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 267] Supreme Court of the United States

Order Allowing Certiorari—Filed October 20, 1930

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 35,252. U. S. Circuit Court of Appeals, Eighth Circuit. Term No. 330. Twin City Pipe Line Company and Industrial Oil & Gas Company, petitioners, vs. Harding Glass Company. Petition for a writ of certiorari and exhibit thereto. Filed August 2, 1930. File No. 35,252.

FILE COPY

Office Supreme Court, U. S.
FILED
AUG 2 1930
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1930.

No. 330

TWIN CITY PIPE LINE COMPANY AND INDUSTRIAL OIL & GAS COMPANY,

Petitioners,

vs.

HARDING GLASS COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

HARRY P. DAILY,
JOHN P. WOODS,
Counsel for Petitioners.

BURTON-ORP-WARREN PRINTING COMPANY, CHICAGO.

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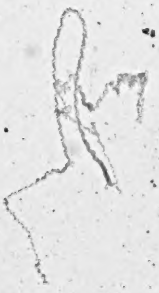

IN THE

Supreme Court of the United States

OCTOBER TERM, 1930.

No. .....

TWIN CITY PIPE LINE COMPANY AND INDUSTRIAL OIL & GAS COMPANY,

Petitioners,

vs.

HARDING GLASS COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS, FOR THE EIGHTH CIRCUIT.

MAY IT PLEASE THE COURT:

A.

Summary Statement of the Matter Involved.

The court below reversed the decree of the trial court, and placed its decision upon the sole ground that a covenant in a written contract by which a customer of a natural gas utility, for a valuable consideration, agreed to take its requirements of natural gas for its two existing glass plants from the utility, at the rates fixed by public authority, so long as the utility could adequately supply same, was in partial restraint of trade, and, therefore, contrary to public policy and void, the announced

theory for such a decision being that one of the parties to the contract was a public utility, and precluded, by reason of its status, from entering into a contract even in *partial* restraint of trade. This decision of the Court of Appeals for the Eighth Circuit is in direct conflict with the decisions of other Circuit Courts of Appeal, and with the local decisions on the same matter, cited hereafter.

The controversy arose in this manner. In August, 1926, the respondent was taking the natural gas used by it at its two factories in the City of Fort Smith Arkansas, from the petitioner, Twin City Pipe Line Company. The Twin City Pipe Line Company was engaged in the business of transporting gas by pipe line from gas fields adjacent to Fort Smith, Arkansas, to that city, where it sold same as a public utility under rates fixed by public authority, both to manufacturers and to the Fort Smith Light & Traction Company, which served domestic consumers. The Fort Smith Light & Traction Company was not connected with petitioners in any way, except that it was a customer. (R. 177-178.)

The petitioner, Industrial Oil & Gas Company, was engaged solely in producing natural gas, and sold its entire production to petitioner, Twin City Pipe Line Company. The petitioners were closely allied. (R. 178.)

In the winter of 1925-1926, there had been a shortage of gas in Fort Smith, and growing out of that shortage and other controversies, litigation had ensued in which petitioners, respondent, and Fort Smith Light & Traction Company were parties.

In the decree in that consolidated cause (R. 107), the petitioner, Twin City Pipe Line Company, had obtained a judgment against respondent, Harding Glass Company, for $17,155.46, and Harding Glass Company had obtained

a judgment over against Industrial Oil & Gas Company, and Harding Glass Company's prayer for injunction, specific performance, and damages was denied. See decree (R. 107) and opinions of trial court in that litigation. (R. 113, 125.) Appeals were taken from that decree to the Court of Appeals for the Eighth Circuit.

In August, 1926, the petitioners and respondent agreed to settle their differences, and the written contract, out of which the present litigation grew, was entered into. (R. 57.) By the express terms of that contract, the petitioner, Twin City Pipe Line Company, was required to satisfy its judgment for $17,155.46 against respondent, Harding Glass Company, and Industrial Oil & Gas Company and Harding Glass Company were required to dismiss their pending appeals, and Twin City Pipe Line Company agreed to build an additional pipe line for the benefit of Harding Glass Company—the right to require such pipe line having been involved and denied by the trial court in the litigation which was being settled. (R. 124, 245.)

All covenants and agreements contained in this contract (save the covenant by which respondent agreed to take its requirements of gas from petitioner) were immediately, completely and fully performed by the parties. (R. 109-111. 140, 245.) The pipe line was built at a cost of $4,489.82. (R. 141.)

The clauses in the contract out of which the present suit grew are paragraphs four and five. (R. 139.) By the terms of these paragraphs respondent "agrees to take all its requirements of gas for its plants in the City of Fort Smith, from the Twin City Pipe Line Company, so long as the Twin City Pipe Line Company can adequately supply its requirements," at the then existing rates for industries fixed by public authority, or at

such changed rates as the public authorities may thereafter fix.

Gas was taken and furnished pursuant to the above provisions down until January 2, 1929, at which time Harding Glass Company began to take practically all of its requirements from its own subsidiary corporations. (R. 148.)

The present suit was started when Harding Glass Company had announced its intention (R. 147-148) of violating the contract and taking its own gas from its own subsidiaries. No excuse or justification for this course of conduct was offered (R. 148, 218-219) except the alleged invalidity of the contract.

This suit was brought to enjoin the respondent from violating its contract in the particulars set forth and a specific performance of the plain terms of that contract was sought and the bill concluded with a prayer for general relief. (R. 2-8.)

The trial court entered a decree enjoining respondent (R. 20) for reasons set forth in its unpublished opinion. (R. 242.) The Court of Appeals reversed this decree and remanded the cause with directions to dismiss plaintiffs' bill (R. 260-261), upon the sole ground that such a "requirements" contract was in *partial* restraint of trade, and that where one of the parties is a public utility and the other party is one of its customers, a contract even in partial restraint of trade is contrary to public policy. (R. 253.) The decree of the court below was entered March 8, 1930. (R. 260-261.) Petition for rehearing was filed in apt time (R. 261-262) and considered and denied June 26, 1930. (R. 262.) The opinion of the court below is reported as *Harding Glass Company* v. *Twin City Pipe Line Company, et al.*, 39 Fed. (2nd) 408, and is also found at (R. 253).

B.

Reasons Relied on for the Allowance of the Writ.

I.

The decision of the Court of Appeals for the Eighth Circuit in the instant case is in direct conflict with the decision of the Court of Appeals for the Tenth Circuit in the case of *Griffin* v. *Oklahoma Natural Gas Corporation*, 37 Fed. (2nd) 545, and with the decision of the Court of Appeals for the Fifth Circuit, in *Montgomery Traction Company* v. *Montgomery Light & Water Power Company*, 229 Fed. 672, which affirmed *Montgomery Light & Water Power Company* v. *Montgomery Traction Company*, 219 Fed. 963, and *Same* v. *Same*, 191 Fed. 657.

A "requirements" contract was involved both in the instant case and in the Griffin and Montgomery cases. In the case at bar and in the Griffin case the customer, for a valuable consideration, agreed to take its fuel requirements for its existing plants from a natural gas utility. In the Montgomery case the customer, a public utility, for a valuable consideration, agreed to take all electric current required by it for the operation of its street car system from an electric power utility.

The conflict between the decision in the Griffin case and the case at bar is well illustrated by the following short quotations from the opinions.

The Court of Appeals for the Eighth Circuit, in its opinion in the present case (R. 256), quoted with approval from the decision in *Coombs* v. *Burke*, 40 Cal. App. 8, the following:

> "Whatever tends to prevent competition in business impressed with a public character is opposed to public policy and is therefore unlawful." (Greenhood on Public Policy, p. 180).
>
> "Where a contract affects such character of busi-

> ness, since no restraint, however partial, can be tolerated, the court will not inquire into or consider the extent of the restriction imposed. *Gibbs* v. *Consolidated Gas Co.*, 130 U. S. 396 (and other cases). As to private business, the conduct of which does not affect the public welfare, and hence involves no question of public policy, a different rule applies, under which contracts, if reasonable in their terms, will be enforced."

While the Court of Appeals for the Tenth Circuit in the Griffin case first pointed out that the City of Iola, in its "business" capacity, had entered into a contract to take from appellee's assignor "all the natural gas required by the city for fuel in the operation of its electric light and water plant," and then said in affirming a decree which enjoined a breach of that contract:

> "Counsel for the City and Griffin further contend that the contracts were void because in restraint of trade. If the restraint were reasonable, under the particular facts and circumstances of the case, the contracts are not invalid because of such restraint." *Gibbs* v. *Consolidated Gas Co.*, 130 U. S. 396 (and other cases).

The contract involved in the Montgomery case is almost identical with the contract in the case at bar. It provided for the sale by an electric power company (a public utility) and the purchase by a street railway company (a public utility) of all electric current required by the street railway company for the operation of its business for a period of fifteen years. It is significant that in the Montgomery case it was not even contended that the contract was void because in restraint of trade, although the contract was attacked on a great number of other grounds. The Court of Appeals for the Fifth Circuit sustained the decree of the District Court enjoining the breach of the contract.

II.

The decision of the Court of Appeals for the Eighth Circuit in the case at bar decides an important question of general law in a way that is untenable and in conflict with the weight of authority.

The validity of contracts whereby a purchaser promises to buy his "requirements" of a commodity from a seller has been sustained in nearly every jurisdiction in the United States.

The decision of the court below announces an exception, in the case of public utilities, to the general and uniform rule applicable to requirements contracts. It holds that a requirements contract between a public utility and an abnormally large industrial user of its service is against public policy and void because in partial restraint of trade. The distinction sought to be made is contrary to reason and authority because the same reasons for upholding the validity of requirements contracts in the case of industries generally apply with equal force to the contract in question and because the contract in question is far less susceptible to attack for illegality based upon monopolistic tendencies for the reason that both the rates and service of the utility entering into the contract in question are regulated by public authority. The necessary effect of the decision is to hold any requirements contract between a public utility and any customer to be void.

The decision announces an untenable rule of law and is contrary to the weight of authority, both as to requirements contracts in general and as to similar contracts of public utilities.

III.

The decision of the Court of Appeals for the Eighth Circuit in the case at bar is in conflict with the applicable local decisions on an important question of local law.

In its opinion the court below says that the public policy to be ascertained is the public policy of Arkansas, but that no specific determination of the question is found in the statutes of the state or decisions of the Supreme Court of Arkansas. (R. 255.)

Yet the Supreme Court of Arkansas in *Fort Smith Light & Traction Company* v. *Kelley*, 94 Ark. 461, 475, held that a contract between parties both of whom were public utilities and involving the sale of gas in the City of Fort Smith, for a period of fifty years, was not void where only in *partial* restraint of trade.

The Court of Appeals has decided an important question of local law in a way which is in conflict with an applicable local decision, relied upon by the trial court in its opinion (R. 244), and not cited or discussed by the Court of Appeals in its opinion.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals, for the Eighth Circuit, commanding that court to certify and to send to this court for its review and determination on a day certain, to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket No. 8686, Harding Glass Company, Appellant v. Twin City Pipe Line Company and Industrial Oil & Gas Company, Appellees, and that the said decree of the United States Circuit Court of Appeals for the Eighth Circuit may be reversed by this Honor-

able Court, and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just. And your petitioners will ever pray.

TWIN CITY PIPE LINE COMPANY,
INDUSTRIAL OIL & GAS COMPANY,
By HARRY P. DAILY,
JOHN P. WOODS,
Counsel for Petitioners.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1930.

No. 330

TWIN CITY PIPE LINE COMPANY AND INDUSTRIAL OIL & GAS COMPANY,

Petitioners,

vs.

HARDING GLASS COMPANY,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

HARRY P. DAILY,
JOHN P. WOODS,
Counsel for Petitioners.

GUNTHORP-WARREN PRINTING COMPANY, CHICAGO.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1930.

No. .....

TWIN CITY PIPE LINE COMPANY AND INDUSTRIAL OIL & GAS COMPANY,

Petitioners,

vs.

HARDING GLASS COMPANY,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

THE OPINIONS OF THE COURTS BELOW.

The opinion in the Court of Appeals for the Eighth Circuit is reported as *Harding Glass Company* v. *Twin City Pipe Line Company, et al.*, 39 Fed. (2nd) 408, and is also found at (R. 253).

The opinion of the trial court will not be reported, but is found at (R. 242).

II.

JURISDICTION.

1. The date of the decree to be reviewed is March 8, 1930. (R. 260.) Within the time provided by the then rules of the Court of Appeals for the Eighth Circuit, petitioners filed in that court their petition for rehearing, which was filed May 6, 1930. (R. 262.) The petition for rehearing was taken under advisement and thereafter denied on June 26, 1930. (R. 262.)

2. The court below, in reversing the decree of the trial court, held that a covenant in a written contract by which a customer of a natural gas utility, for a valuable consideration, agreed to take its requirements of natural gas for its two existing gas plants from the utility, at the rates fixed by public authority, so long as the utility could adequately supply same, was in partial restraint of trade and therefore contrary to public policy and void. (R. 256.)

This decision (1) is in conflict with the decision of the Circuit Court of Appeals for the Tenth Circuit and with the decision of the Circuit Court of Appeals for the Fifth Circuit on the same matter, (2) is untenable and in conflict with the weight of authority on an important question of general law and (3) is in conflict with the decision of the Supreme Court of Arkansas on an important question of local law. (Rule 35, Section 5.)

3. The jurisdiction of this court is invoked under U. S. C. Title 28, Section 347 (a) formerly Section 247 of the Judicial Code as amended by the Act of February 3, 1925.

4. The following cases sustain the jurisdiction of this court in this case:

Magnum Import Co. v. *Coty,* 262 U. S. 159, 163.
Forsyth v. *Hammond,* 166 U. S. 506, 512.
Fields v. *United States,* 205 U. S. 292, 296.

III.

STATEMENT OF THE CASE.

It is believed that a full statement of the case has been given in the petition under the heading, "A Summary Statement of the Matter Involved." In the interest of brevity, therefore, the statement will not be repeated here.

SPECIFICATION OF ERRORS.

1. The lower court erred in holding that a contract between a customer of a public utility and the utility, by which the former agreed to take its requirements of natural gas for its existing plants from the utility, is contrary to public policy and void.

SUMMARY OF ARGUMENT.

Point One.

THE DECISION OF THE COURT BELOW IS IN CONFLICT WITH THE DECISIONS OF OTHER CIRCUIT COURTS OF APPEAL ON THE SAME MATTER.

Point Two.

THE DECISION OF THE COURT BELOW DECIDES AN IMPORTANT QUESTION OF GENERAL LAW IN A WAY THAT IS UNTENABLE AND IN CONFLICT WITH THE WEIGHT OF AUTHORITY.

Point Three.

THE DECISION OF THE COURT BELOW IS IN CONFLICT WITH THE APPLICABLE LOCAL DECISIONS ON AN IMPORTANT QUESTION OF LOCAL LAW.

ARGUMENT.

POINT ONE.

THE DECISION OF THE COURT BELOW IS IN CONFLICT WITH THE DECISIONS OF OTHER CIRCUIT COURTS OF APPEAL ON THE SAME MATTER.

The court below, in holding the contract void, puts its decision on the ground that one of the parties is a public utility, and therefore, for that reason alone, precluded from entering into a contract which can be construed as being even in partial restraint of trade.

A diametrically opposite conclusion is reached by the Court of Appeals for the Tenth Circuit, in passing upon an essentially similar natural gas "requirements" contract between a public utility and the City of Iola, Kansas, one of its customers.

Griffin, et al. v. *Oklahoma Natural Gas Corporation*, 37 Fed. (2nd) 545.

That court affirmed a decree which enjoined the customer from taking from another its natural gas requirements for the operation of its municipal plant and for resale to the inhabitants of the city, holding in answer to the plea that the contract was void because in restraint of trade, that the contract was reasonable, and therefore not invalid, even though in *partial* restraint of trade.

The petition for certiorari contains short quotations from the opinion of the court below, and from the opinion of the Court of Appeals for the Tenth Circuit, in the *Griffin case, supra*, which sharply illustrate the conflict between the two decisions on the same matter.

The two cases cannot be differentiated on the facts. An analysis of the undisputed facts, in the two cases, simply accentuates the conflict between these decisions on the question of law.

In both cases a contract was entered into with a public utility for the fuel requirements of an existing industrial plant.

Both contracts were supported by an adequate consideration. In the instant case, that consideration was not simply the mere agreement on the part of the utility to furnish the fuel. The important consideration, which supported the covenant of the customer, was the settlement of the then pending litigation between the parties. The petitioner, Twin City Pipe Line Company, pursuant to the covenants contained in the contract requiring it to do so (R. 139), satisfied a judgment which it had obtained against the customer amounting to more than $17,000 (R. 109), and in addition thereto, and pursuant to the terms of the contract, built a pipe line at an expense of over $4,000 (R. 241), which the trial court in the previous litigation had held it was not obligated to build (R. 245), and the petitioner, Industrial Oil & Gas Company, dismissed its pending appeal. (R. 111-112.) The adequacy of this consideration cannot be questioned. The very terms of the contract, and the character of consideration, moving from the utility, show that the contract was entered into primarily for the purpose of settling pending litigation between the parties, and for the protection of necessary investment of the utility to serve this particular and abnormal customer, and that it was not part or parcel of any scheme by which the utility sought to tie up industries generally in order to avoid competition. There is no evidence in the record that any similar contract was entered into with other industries.

Carter-Crume Co. v. *Peurung*, 86 Fed. 439.

The contract in the instant case was made between the utility and a window glass company, while the contract in the Griffin case was made between a utility and a municipal corporation. But the opinion in the Griffin case makes plain that the city entered into the contract in that case in its "business" and not in its "governmental" capacity, so there is no distinction between the cases on this ground.

In the Griffin case the utility spent large sums of money after the contract was signed in putting itself in position to furnish the gas. In the instant case one petitioner satisfied a $17,000 judgment and built a $4,000 pipe line, while the other has spent over $70,000 in drilling new gas wells to the end that respondent might be adequately supplied. (R. 152-153.)

The contracts in the Griffin case ran for a term of five years, but further provided that the utility should not be required to furnish gas nor be liable for shortage caused by failure of gas in the territory from which the utility obtained its supply, or because of failure of the pressure of the gas wells.

The contract in the case at bar was for as long as the utility could adequately supply the gas. The industry had been buying gas from the utility for a number of years and knew its source of supply (R. 155-157), and the testimony of respondent's own president makes plain that a contract for a shorter period of time, in view of the improvements which it contemplated, and the character of manufacturing in which it was engaged, would have been of no value to it. (R. 216-219.)

In other words, no window glass manufacturer would *contract* for gas for a less period of time than the life of the gas field, and in view of the known exhaustibility of gas fields, it is difficult to see how the contract could

be condemned as unreasonable on this ground. The subject matter of the contract, natural gas, when taken in connection with the character of business in which the manufacturer was engaged, demanded a contract for the life of the gas field.

The opinion of the court below emphasizes throughout the inability of a public utility to enter into a contract, whether with its customers or others, which involves any restraint of trade, however partial, while a "requirements" contract, such as is involved in both cases, is recognized as reasonable and valid by the Court of Appeals for the Tenth Circuit in the Griffin case, and no distinction is made in that case, because the person supplying the customer happens to be a public utility.

The decision of the court below is also in direct conflict with the decision of the Circuit Court of Appeals for the Fifth Circuit in the case of *Montgomery Traction Co.* v. *Montgomery Light and Water Power Co.*, 229 Fed. 672. The contract involved in this case obligated the traction company to purchase from the power company "exclusively for the period of fifteen years * * * such direct electrical current * * * as it may require for propelling, lighting and heating its passenger and freight cars" and other purposes, in and about the City of Montgomery, Alabama. The traction company attempted to discontinue receiving electrical current from the power company and take it from another source. The power company instituted suit to enjoin the traction company from receiving current from any person other than the power company. A demurrer to the bill was overruled in *Montgomery Light and Water Power Co.* v. *Montgomery Traction Company*, 191 Fed. 657, and a decree was granted perpetually enjoining the traction company from taking electrical current from any person other than the power company during the term

covered by the contract and so long as the power company performs its part of the contract. The style of the case is *Montgomery Light and Water Power Co.* v. *Montgomery Traction Co.*, 219 Fed. 963. The decree was affirmed by the Circuit Court of Appeals Fifth Circuit, in the case above referred to.

The contract in the Montgomery case is almost identical with the case at bar and the relief granted by the decree in that case is in accord with the views expressed in the opinion of the trial court in the case at bar.

We submit, therefore, that the decision of the court below is in direct conflict with the decision of the Circuit Court of Appeals for the Tenth Circuit in the Griffin case and with the decision of the Circuit Court of Appeals for the Fifth Circuit in the Montgomery case.

Point Two.

THE DECISION OF THE COURT BELOW DECIDES AN IMPORTANT QUESTION OF GENERAL LAW IN A WAY THAT IS UNTENABLE AND IN CONFLICT WITH THE WEIGHT OF AUTHORITY.

The validity of contracts whereby a purchaser promises to buy his "requirements" of a commodity from a seller, has been sustained in nearly every jurisdiction in the United States. Indeed, it would be difficult to find a principle of law more definitely established than the doctrine applicable to the validity of requirements contracts. Requirements contract such as we have in the case at bar and in the Griffin and the Montgomery cases are commonplace. Manufacturers ordinarily and commonly contract for the purchase of their requirements of fuel or material in order to insure themselves an adequate and sufficient supply at all times. Without the assurance of distribution which such contracts give, it

would be extremely hazardous for sellers to carry on extensive development of natural resources or to expand equipment for manufacturing. To vitiate such contracts is to condemn a well recognized business practice without promoting or protecting any public interest.

The following cases uphold the validity of requirements contracts:

United States v. *Purcell Envelope Co.* (1919), 249 U. S. 313.

Brawley v. *United States* (1878), 96 U. S. 168.

Willard, Sutherland & Co. v. *United States* (1923), 262 U. S. 489.

Smoot v. *United States* (1915), 237 U. S. 38.

Pittsburgh Plate Glass Co. v. *H. Neuer Glass Co.* (1918), 165 C. C. A. 61; 253 Fed. 161.

Loudenback Fertilizer Co. v. *Tennessee Phosphate Co.* (1903), 58 C. C. A. 220; 121 F. 298.

Lima Locomotive & Machine Co. v. *National Steel Castings Co.* (1907), 83 C. C. A. 593; 155 Fed. 77.

Manhattan Oil Co. v. *Richardson Lubricating Co.* (1902), 51 C. C. A. 553; 113 Fed. 923.

Marx v. *American Malting Co.* (1909), 95 C. C. A. 80; 169 Fed. 582.

Rockhill Iron & Coal Co. v. *City of Taunton* (1921), 273 F. 96.

National Pub. Co. v. *International Paper Co.* (1920), 269 F. 903.

Texas Co. v. *Pensacola Maritime Corp.* (1922), 279 Fed. 19. (See also 292 F. 61; 300 F. 51.)

Mills-Morris Co. v. *Champion Spark Plug Co.* (1925), 7 Fed. (2nd) 38.

Sterling Coal Co. v. *Silver Spring Bleaching & Dyeing Co.* (1908), 89 C. C. A. 520; 162 Fed. 848.

Conley Camera Co. v. *Multiscope & Film Co.* (1914), 216 Fed. 892.

Diamond Alkali Co. v. *P. C. Tomson & Co., Inc.* (1929), 35 Fed. (2nd) 117.

Ehrenworth v. *George F. Stuhmer & Co., Inc.* (1920), 229 N. Y. 210; 128 N. E. 108.

Lone Star Gas Co. v. *Municipal Gas Co.* (1928), 117 Tex. 331; 3 S. W. (2nd) 790.

Cox, Inc. v. *Humble Oil & Refining Co.* (1929), Comm. of App. Tex. 16 S. W. (2nd) 285.

Big Four Ice & Cold Storage Co. v. *Williams* (1928), Court Civ. App. Tex. 9 S. W. (2nd) 177.

Minnesota Lumber Co. v. *Whitebreast Coal Co.* (1895), 160 Ill. 85; 43 N. E. 774.

Jackson Hill Coal & Coke Co. v. *Merchants' Heat & Light Co.* (1923), 193 Ind. 422; 140 N. E. 532.

C. G. Blake Co., Inc. v. *W. R. Smith & Son, Limited* (1926), 147 Va. 960; 133 S. E. 685.

Hendler Creamery Co. v. *Lillich* (1927), 152 Md. 190; 136 Atl. 631.

Elk Refining Co. v. *Falling Rock Cannel Coal Co.* (1922), 92 W. Va. 479; 115 S. E. 431.

Home Gas Co. v. *Mannington Co-Operative Window Glass Co. et al.* (1907), 63 W. Va. 266; 61 S. E. 329.

Albany Power & Mfg. Co. v. *City of Albany* (1909), 133 Ga. 375; 65 S. E. 886.

O'Bryan v. *Mengel Co.* (1928), 224 Ky. 284; 6 S. W. (2nd) 249.

The decision of the court below is in direct conflict with the weight of authority on the question of the validity of requirements contracts. It announces a new

doctrine applicable only to one class of requirements contracts—the requirements contracts of a public utility. It excepts such contracts from the application of the universally recognized rule sustaining the validity of requirements contracts, on the sole ground that such contracts, when made by a public utility for the sale of its commodity are in partial restraint of trade and therefore against public policy and void.

Undoubtedly, all requirements contracts have some tendency to restrain the absolute freedom of trade. A manufacturer using coal for fuel in his operations agrees to buy five hundred tons during the winter of 1930; such a contract might by a process of reasoning be said to be in partial restraint of trade because it would prevent a competitor of the seller from supplying a part of the coal, yet it would hardly be urged that such a contract is illegal because in partial restraint of trade. Certainly the character and effect of such a contract would not be changed merely because the seller was a public utility and the commodity sold was gas or electricity instead of coal. Yet the court below makes a distinction in the application of the doctrine application to such contracts. This distinction is not justified in reason (1) because it is apparent that a contract of this character between a public utility and an abnormally large industrial user of its service is reasonably required as a matter of sound business in order to protect the large investment that the utility must make in order to serve adequately such a customer; otherwise the customer is left free to abandon at any time the use of the investment in plant and line capacity or the development of gas producing territory (as in the case at bar) made specially to serve it, and it is apparent that such a course must lead to business disaster or at least must seriously cripple the utility in it ability to serve properly the gen-

eral public, and (2) because it is apparent that a "requirements" contract between a public utility and a large industrial user of its service is far less susceptible to attack for illegality based upon monopolistic tendencies than similar contracts of purely private corporations where, as in the case at bar, the rates and service of the public utility are regulated by public authority. Under Act 124 of the Acts of Arkansas 1921 (applicable section quoted in Appendix), the City Commission of the City of Fort Smith is vested with the power to make all reasonable and proper rules and regulations with reference to the operations of the Twin City Pipe Line Company within the municipality (including the power to fix and regulate rates and to order the performance of any duty devolving on it under its franchise or contracts); outside the corporate limits of the municipality the power of regulation is vested in the Arkansas Railroad Commission. Private corporations are, of course, not subject to such regulation. It is impossible to divorce the business of a public utility from business considerations logical to the conduct of all business.

By the terms of the contract, involved in the present case, the Pipe Line Company did not agree not to sell gas to others. It did not agree to limit or to restrict its business as a public utility. The gas, to be furnished under the terms of the contract, was to be furnished at the then legally established rates, or at such rates as the public authorities might thereafter establish. The Harding Glass Company did not agree that it would not build other plants, or in the event that it did do so, did not agree to take its gas for such new plants from petitioner. It simply agreed to buy its requirements for its existing plants from the petitioner.

The court below in support of its opinion cites *Coombs v. Burke*, 40 Cal. App. 8, on the proposition that where

a contract affects a business impressed with a public interest, no restraint, however, partial, will be tolerated. That case involving an action to recover $330 on contract, was decided in 1919 by an intermediate court of the State of California (District Court of Appeals, Second District, Division 1), and has never been cited or approved by any court (other than the court which rendered the decision) except by the Circuit Court of Appeals of the Eighth Circuit in the case at bar. The authorities cited in the opinion in that case in support of the doctrine announced are clearly distinguishable and do not sustain the conclusions reached.

The remaining authorities cited by the court below in support of its opinion undoubtedly sustain the general principles of law in respect to monopoly and combinations in restraint of trade set forth therein. We contend, however, that the general doctrines announced in those cases are not determinative of the case at bar. None of the cases cited, with the possible exception of the Coombs case, involved a "requirements" contract such as is presented by the case at bar.

"Requirements" contract have been sustained by this court in *United States* v. *Purcell Envelope Co.* (*supra*), *Brawley* v. *United States* (*supra*), *Willard Sutherland & Co.* v. *United States* (*supra*) and *Smoot* v. *United States* (*supra*). None of the authorities (except the Coombs case) has held a "requirements" contract between a public utility and one of its customers invalid because in partial restraint of trade, while the Circuit Court of Appeals for the Tenth Circuit, in *Griffin, et al.* v. *Oklahoma Natural Gas Corporation* (*supra*), the Circuit Court of Appeals for the Fifth Circuit in *Montgomery Traction Co.* v. *Montgomery Light & Water Power Co.* (*supra*), and the Commission of Appeals (Section B)

of Texas, in *Cox, Inc.* v. *Humble Oil & Refining Co.* (*supra*), have upheld the validity of such contracts.

We submit, therefore, that the decision of the court below is untenable and is not sustained by reason or authority.

Point Three.

THE DECISION OF THE COURT BELOW IS IN CONFLICT WITH THE APPLICABLE LOCAL DECISIONS ON AN IMPORTANT QUESTION OF LOCAL LAW.

The court below, in its opinion, said:

> "The public policy to be ascertained is the public policy of Arkansas. *Northwestern Life Insurance Co.* v. *Johnson*, 254 U. S. 96."

And

> "No specific determination is found in the statutes or decisions of the Supreme Court of Arkansas applicable to the exact situation."

But it must be conceded that the Supreme Court of Arkansas has said that contracts between private individuals are valid when only in *partial* restraint of trade. The case of *Webster* v. *Williams*, 62 Ark. 101, is cited by the court below. In that case a contract of a physician to retire permanently from the practice of medicine in a given city was upheld against the plea, that such a contract was in unreasonable restraint of trade. The facts in that case and the opinion of the court, are on all fours with the facts and the opinion in the case of *Mills* v. *Ressler*, 87 Kansas 549, cited by the Court of Appeals for the Tenth Circuit, in the Griffin case.

In the case of *Keith* v. *Herschberg*, 48 Ark. 146, a contract which gave to a merchant the exclusive right to sell a particular character of goods in the town of Boone-

ville, was upheld against the contention that it was in unreasonable restraint of trade, and therefore, void.

These two cases are cited with approval by the Supreme Court of Arkansas, in *Fort Smith Light & Traction Company* v. *Kelley*, 94 Ark. 461. This case was relied upon by the trial court in its opinion (R. 244-245), but was ignored by the Court of Appeals for the Eighth Circuit in its opinion. The 6th syllabus of that case (page 462) reads as follows:

> "A contract whereby a person agrees not to supply natural gas in a certain city is only in partial restraint of trade, and, is therefore, not void."

In that case the contract was between two parties, both of whom were engaged in the public business of supplying natural gas. It was contended by Kelley that, "If the contract did undertake to exclude defendants from Fort Smith for forty-nine years, it would be a restraint of trade and competition, against public law and policy, and unenforceable."

The Supreme Court of Arkansas answered this contention (page 475) in part, as follows:

> "But, should we be mistaken in holding that the contract is not one in restraint of trade, then we are of the opinion that at most, it could only be a contract in *partial* restraint of trade. *Under all the authorities and our own decisions, such contracts, when reasonable, are not against public policy, and therefore are not void. Keith* v. *Herschberg Optical Co.*, 48 Ark. 146; *Webster* v. *Williams*, 62 Ark. 101."

Further along in the opinion the Supreme Court of Arkansas said:

> "That courts of chancery will grant relief by injunction to prevent a breach of contract in partial restraint of trade is well settled."

Here was a contract which involved exactly the same public business which is involved in the present case.

It was a contract which involved supplying gas to all of the inhabitants of the City of Forth Smith, and the contract ran for a period of forty-nine years. Yet, the Supreme Court of Arkansas, applying the same rule to this contract that it had previously applied to contracts between individuals, held that the contract was not invalid, because it was only in *partial* restraint of trade.

In the later case of *Kimbrough* v. *Wells*, 112 Ark. 126, 130, the case of *Fort Smith Light & Traction Co.* v. *Kelley, supra*, and the case of *Webster* v. *Williams, supra*, were cited with approval, in upholding a contract which was in partial restraint of trade.

The test, and the only test which the Supreme Court of Arkansas has laid down is the reasonableness of the contract. This is the same rule announced by the Court of Appeals for the Tenth Circuit, in the Griffin case. No distinction is made by the Supreme Court of Arkansas by reason of the fact that one of the parties to the contract is a public utility. In announcing a contrary rule, the court below has adopted a public policy for the State of Arkansas, in the federal courts, which is contrary to the public policy enforced in the state courts.

The statutes of Arkansas authorize municipalities to grant exclusive franchises for gas, electric light and other utilities. C. & M. Digest, 7492 (quoted in Appendix). The validity of this section has been recognized in *City of Eldorado* v. *Coates*, 175 Ark. 289, and *Cap F. Bourland Ice Company* v. *Franklin Utilities Company*, 180 Ark. 770. Similar statutes relative to toll bridges and ferries have been upheld by that court in *McClintock* v. *Bovay*, 164 Ark. 482, and *McClintock* v. *White River Bridge Company*, 171 Ark. 943.

Some point is made of the fact that the Harding Glass Company is a very large consumer of gas, but the amount

of gas involved is nothing as compared with the amount involved in the case of *Fort Smith Light & Traction Company* v. *Kelley, supra.* But in addition thereto, it is the very fact, that the Harding Glass Company is a tremendous consumer of gas, which makes the contract reasonable. The Twin City Pipe Line Company, prior to the signing of this contract, and at the present time holds itself out as a public utility, serving manufacturers in the City of Fort Smith. Any manufacturer, by paying the rates fixed by public authority, has the right to demand a connection, and to take as much or as little gas as he pleases.

The Twin City Pipe Line Company, as a public utility, is required to use ordinary diligence in providing reasonable facilities, and a reasonable supply of gas for its customers. But it is not an insurer of that supply. If one of the manufacturers, using an enormous quantity of gas, has the right to take its gas, or not, at will, from the utility, as it undoubtedly does in the absence of a contract, then the public utility through necessity will be driven to make only reasonable exploration and developments in advance of present needs. Financial considerations, if nothing else, would prevent the utility from developing or contracting for a supply of gas far in advance of present needs, when such a large customer could quit it at will. This particular customer, according to the undisputed testimony of its own president, needs natural gas for its existing plants for a long period of time. These two parties, for a valuable consideration, contracted for such requirements during the life of the gas field, to be paid for at the rates fixed by public authority. The results of the contract was an expansion of the business of the manufacturer, and an immediate development of the gas-producing territory, far in advance of present needs. The necessary effect

of this was beneficial both to the public and to the parties. Having secured the benefit of the contract, the manufacturer then decided to take its own gas from its own subsidiaries or from the public utility, as might be most convenient to it from day to day. (R. 148-149.)

The public policy of Arkansas, as announced by the Supreme Court of that state, does not require that any such flagrant breach of contract shall be tolerated.

Conclusion.

In *Steele* v. *Drummond*, 275 U. S. 199, 205, this court announced that it was a matter of great public concern, that freedom of contract be not lightly interfered with, and that it is only in clear cases that contracts will be held void, or declared illegal, because of public policy. And in the very recent case of *Patton* v. *United States*, 281 U. S. 276, 306, it was stated:

> "The truth is that the theory of public policy embodies a doctrine of vague and variable quality, and unless deducible in given circumstances from constitutional or statutory provisions, should be accepted as the basis of a judicial determination, if at all, only with the utmost circumspection."

It is, therefore, respectfully submitted that the petition for certiorari should be granted, and that upon a final hearing the decree of the court below should be reversed and the decree of the trial court should be affirmed.

By Harry P. Daily,
John P. Woods,
Counsel for Petitioners.

Appendix.

Acts of Arkansas 1921 (General) Act 124, Section 6.

"Section 6. That section 8 of the said Act No. 571 of the General Acts of the General Assembly of the State of Arkansas of 1919, above more particularly referred to, be and the same is hereby amended to read as follows:

"Section 8. Authority to Establish Rates. The commission shall have the power, after reasonable notice and after full and complete hearing, to enforce, originate and establish, modify, change, adjust and promulgate tariffs, rates, joint rates, tolls and schedules for all public service corporations, companies and utilities and all rates and regulations with reference thereto and orders directing the performance of any duties devolving on said company, utility, common carrier or public service corporation under the terms of this act; and whenever the commission shall, after notice and hearing, find any existing rates, tolls, tariffs, joint rates or schedules unjust, unreasonable, insufficient or unjustly discriminatory or otherwise in violation of any of the provisions of law, the commission shall, by an order, fix reasonable rates, joint rates, tariffs, tolls, charges or schedules to be followed in the future in lieu of those found to be unjust, unreasonable, insufficient or unjustly discriminatory, inadequate or otherwise in violation of any of the provisions of this law; provided, however, that nothing herein shall authorize said commission to make any rule, regulation or order whatever to be effective within the limits of any municipality of this State with reference to any tariff, rate, toll, schedule, duty or action of any public service corporation, company or public utility operating within such municipality as a street railroad, telephone company, gas company, pipe line company for transportation of oil, gas or water, electrical company, for the generation or distribu-

tion, sale or supply of electricity for heat, light or power, water company or hydro-electric company, it being the intention of this act, hereinafter more particularly expressed, to confer upon the municipal councils and city commissions of this State, jurisdiction as to such matters, so far as same are effective within the limits of any municipality of this State."

Section 7492, Digest of the Statutes of Arkansas, Crawford & Moses, 1921:

"SEC. 7492. Exclusive privileges. For the purpose of providing water, gas, electric light, heat, cold storage or street railroad, the mayor and council may contract with any person or company to construct and operate such utilities, and may grant to such person or company, for a time which may be agreed upon, the exclusive privilege of using the streets and alleys of such city for such purposes and may authorize such person or company to assign such contract or privileges and transfer such utility to any other person or company having authority to conduct any such business in the city, with full authority to the assignee or transferee to enjoy and use the same in like manner and to the same extent as the assignor could have done; and all such assignments and transfers which have heretofore been made, are hereby ratified and approved. Act March 19, 1925, p. 692."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1930

No. 330

TWIN CITY PIPE LINE COMPANY AND INDUSTRIAL OIL & GAS COMPANY,

Petitioners,

vs.

HARDING GLASS COMPANY,

Respondent.

REPLY BRIEF OF PETITIONERS

HARRY P. DAILY,
JOHN P. WOODS,
Counsel for Petitioners.

CALVERT-McBRIDE PRINTING CO., FT. SMITH, ARK.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1930

No. 330.

TWIN CITY PIPE LINE COMPANY AND INDUSTRIAL OIL & GAS COMPANY,

Petitioners,

vs.

HARDING GLASS COMPANY,

Respondent.

REPLY BRIEF OF PETITIONERS

THE FACTS

The question presented for determination does not turn upon any dispute as to the facts. The Trial Court made a complete statement of the facts, based upon the undisputed evidence, and this finding was not disturbed by the Court of Appeals. We have no quarrel with the statement of facts made by the Trial Court or by the Court of Appeals. If Respondent's brief gives the Court any information as to these facts not afforded by Petitioners' statement, so much the better.

POINT ONE

THE DECISION OF THE COURT BELOW IS IN CONFLICT WITH THE DECISIONS OF OTHER CIRCUIT COURTS OF APPEAL ON THE SAME MATTER.

In the petition and original brief, it was pointed out that the decision below was in conflict with the decision of the Court of Appeals for the Tenth Circuit in *Griffin, et al v. Oklahoma Natural Gas Corporation*, 37 Fed. (2nd) 545.

Counsel for respondent contends (pages 17 to 20 of their brief) that there is no conflict between the decisions in the Griffin case and the instant case, because the decision in the instant case deals with the public policy of Arkansas, while the decision in the Griffin case deals witn the public policy of Kansas. But the decision of the Court below is not based upon any rule of public policy peculiar to the State of Arkansas, as evidenced by constitutional or statutory provisions, or rulings of the Supreme Court, of that state. Nor was the decision in the Griffin case on the point under discussion based upon any rule of public policy peculiar to the State of Kansas, as evidenced by constitutional or statutory provisions, or rulings of the Supreme Court, of that state. On the contrary, both decisions on the point were based upon alleged general principles of the common law as to what contracts are void because in restraint of trade and therefore contrary to public policy. In the Griffin case this clearly appears from the decisions cited in support of the Court's conclusion on this point and from the absence of any reference to any constitutional or statutory provisions in the State of Kansas bearing on that point. In the instant case the Court below cited in support of its ruling only authorities dealing with general principles of the common law and said:

> "The constitution of Arkansas (Art. II, Sec. 19) contains this provision: 'Perpetuities and monop-

olies are contrary to the genius of a republic and shall not be allowed.' No specific determination is found in the statutes or decisions of the Supreme Court of Arkansas applicable to the exact situation. That court has decided many questions involving alleged restraints of trade, * * * in recognition of the *common law principles* applicable." (Italics ours.)

We think it manifest from a reading of these cases that both were based solely upon a consideration of common law principles. The respective Circuit Courts of Appeal simply reached different conclusions in applying the same general rule of law. It follows that the distinction attempted to be made by counsel for respondents is without foundation.

It is also argued on page 25 of Respondent's brief that in the Griffin case "the furnisher of gas (Oklahoma Natural Gas Corporation) was not a public utility," and the same thought runs through page 17 of Respondent's brief. It is specifically pointed out in the Griffin case (page 547) that the Oklahoma Natural Gas Corporation purchased the contracts "together with certain physical properties of the Southern Kansas Gas Company and made formal application to the Public Service Commission for authority to acquire such contracts and physical properties" and that the Commission authorized the assignments. The definition of a public utility in the Kansas statutes (Section 66-104, Revised Statutes 1923) includes oil and gas pipe line companies. From the opinion, it is plain that Oklahoma Natural Gas Corporation was a public utility. *Fort Smith Spelter Company v. Clear Creek Oil & Gas Company*, 267 U. S. 231. That the contracts (in the Griffin case) may not have been

originally entered into with a public utility is immaterial, in view of the fact that they were assigned to, and carred out and enforced by, a public utility.

Respondent further contends on page 18 of their brief, and elsewhere, that there is no conflict between these decisions, because in the Griffin case the decision turns on whether the contract was "void because in restraint of trade," while in the case at bar the contract was declared "void because against public policy." This alleged distinction is without merit. A contract is void as in unreasonable restraint of trade (where it violates no anti-trust statute) only because such a contract is opposed to public policy. The Court below held that the contract involved in the instant case was void on the ground that the covenantee was a public utility and the contract *tended* to prevent competition, while in the Griffin case the Court of Appeals for the Tenth Circuit held that contracts of precisely the same kind were not void although one of the parties was a public utility. The attempt by counsel for Respondents to distinguish the Griffin case on the alleged economic ground that contracts for the supply of municipal plants are for the public good is unfounded, since competition in the supply of gas should be of as much, or as little, advantage to one set of consumers as to another.

On its facts, the case of *Montgomery Traction Company v. Montgomery Light and Water Power Co.*, 229 Fed. 672, is in direct conflict with the holding of the Court below in the instant case.

Point Two

THE DECISION OF THE COURT BELOW DECIDES AN IMPORTANT QUESTION OF GENERAL LAW IN A WAY THAT IS UNTENABLE AND IN CONFLICT WITH THE WEIGHT OF AUTHORITY.

Counsel for Respondent points out that "requirements contracts" cannot disregrad public policy. That, of course, is true but Petitioner's point is that such contracts uniformly have been held to be valid and that the cases so holding are authorities in support of the proposition that such contracts are not opposed to public policy on the ground of being in unreasonable restraint of trade or otherwise and have never been so considered. Nor is any exception to this rule in the case of public utilities supported by authority. The case of *Coombs v. Burke* is the only case cited that tends to support this proposition while the contrary rule is supported by the cases cited on pages 14 and 15 of Petitioner's brief.

The undisputed proof is that the Citizens Pipe Line Company is not a public utility but is a mere instrumentality used by the Harding Glass Company for supplying itself with its own gas (R. 16-148-201-218-219), after it had contracted to take its gas requirements for its existing plants from Petitioner. This was conceded by counsel at the trial (R. 221). It can hardly be called a competitor, as its acts are in effect the acts of the consumer, Harding Glass Company.

No fair question can exist as to the adequacy of the considerations supporting the contract or that its obligations were mutual.

Point Three

THE DECISION OF THE COURT BELOW IS IN CONFLICT WITH THE APPLICABLE LOCAL DECISIONS ON AN IMPORTANT QUESTION OF LOCAL LAW.

The Court below held the contract void as against public policy—presumably the public policy of the State of Arkansas, as no federal question was involved. For the reasons heretofore pointed out, we think it apparent that the Court's decision was based on what it considered to be the general provisions of the common law applicable. Counsel for Respondent, in support of the contention that the contract is contrary to the public policy of Arkansas, refer to Section 19 and other sections of Article II of the Constitution of Arkansas (quoted but apparently not relied on by the Court below in its opinion), the case of *Cap F. Bourland Ice Co. v. Franklin Utilities Co.*, 180 Ark. 770, the *Arkansas Anti-Trust Law* (which Counsel concede does not prohibit the contract) and certain other Arkansas decisions which clearly are not in point. Section 19 of Article II of the Constitution referred to is in a part of the Constitution of 1874 and was in force when the decisions of the Supreme Court of Arkansas cited in our original brief, relative to contracts in restraint of trade, were announced. That section has never been regarded by the Supreme Court of Arkansas as prohibiting contracts in partial restraint of trade and in fact has been construed as not prohibiting a monopoly on the part of public service companies. As construed by the Supreme Court of Arkansas, it prohibits monopolies only in connection with businesses which are open as a matter of common right to all

and for the conduct of which no franchise from the state or subdivision thereof is required. The case of *Cap F. Bourland Ice Co v. Franklin Utilities Co.* makes this entirely clear. The proposed monopoly in the ice business involved in that case was condemned solely on the ground that the conduct of the ice business is a matter of common right and requires no franchise for its conduct. The Court in that case expressly recognizes the validity of exclusive franchises to public service companies and bridge companies and for ferries. It seems clear, therefore, that Section 19 of the Constitution as construed by the Supreme Court of Arkansas contains no prohibition applicable to gas companies. On the contrary, the statutes of Arkansas (C. & M. Digest, 7492, quoted in Appendix to our original brief) expressly authorize the creation of a monopoly on the part of gas utilities. It is difficult to understand on what theory a contract of a gas utility, which clearly does not create a monopoly and is only claimed to *tend* in that direction, can be held to be illegal as opposed to the public policy of Arkansas when the statutes and decisions of the Supreme Court of that state expressly declare that a monopoly on the part of a gas utility is not illegal.

The Arkansas decision which does come nearest to the exact question at issue is *Fort Smith Light & Traction Co. v. Kelley*, 94 Ark. 461. The Trial Court relied upon this decision, the Court below ignored it, and Counsel dismiss it as mere obiter. (Respondent's brief, page 49). Dicta or not, it is the last word of the Supreme Court of Arkansas on the subject.

It is also argued that the contract is unreasonable

because it is for the life of the gas field. In *Webster v. Williams,* 62 Ark. page 101, the Court said:

> "Was the contract void? Contracts in restraint of trade are either general or partial. Where the contract is unlimited as to space, it is general; where it is *limited as to space,* it is partial, although it may be unlimited as to time. * * * * Contracts in partial restraint of trade, if they are reasonable and founded upon a legal consideration, will be enforced."

The above is in exact accord with the opinion of this Court in *Fowle v. Park,* 131 U. S. 88, where contracts limited as to space but unlimited as to time were upheld against the plea that they were in unreasonable restraint of trade. The contract in the instant case was not only limited geographically, but was also limited to two existing plants.

In *Warmack v. Major Stave Company,* 132 Ark. 173, the Supreme Court of Arkansas said with reference to a contract between a public utility and one of its customers:

> "The principle that the company must supply all impartially and without discrimination does not prevent it from entering into reasonable arrangements or agreements with its customers growng out of special circumstances."

It is submitted that the contract in question merely laid down reasonable business provisions with respect to the furnishing of gas in the quantities covered by the contract, and was not in unreasonable restraint of trade, and that there exists no public policy of the State of Arkansas prohibiting or making illegal such a contract, as is evidenced by the statutes and ruling of the Supreme Court of Arkansas.

Conclusion

The thought expressed in *Hall Mfg. Co. v. Western Steel & Iron Works* (C. C. A. 7), 227 Fed. 588, 593, that in all cases of this kind there must be balanced against the public interest that is opposed to restrictive covenants that other public interest which demands honesty and fidelity among our business men, finds support in *Baltimore and O. S. R. Co. v. Voigt*, 176 U. S. 498, where the followng was quoted with approval:

> "It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred, and shall be enforced by courts of justice. Therefore, you have this paramount public policy to consider—that you are not lightly to interfere with this freedom of contract."

Respectfully submitted,

Harry P. Daily,
John P. Woods,
Counsel for Petitioners.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1930.

No. 330

TWIN CITY PIPE LINE COMPANY AND INDUSTRIAL OIL & GAS COMPANY,

Petitioners,

vs.

HARDING GLASS COMPANY,

Respondent.

BRIEF OF PETITIONERS.

HARRY P. DAILY,
JOHN P. WOODS,
Counsel for Petitioners.

GUNTHORP-WARREN PRINTING COMPANY, CHICAGO.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1930.

No. 330.

TWIN CITY PIPE LINE COMPANY AND INDUSTRIAL OIL & GAS COMPANY,

Petitioners,

vs.

HARDING GLASS COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR THE PETITIONERS.

OPINIONS BELOW.

The opinion of the trial court, United States District Court for the Western District of Arkansas, Fort Smith Division will not be reported, but is found at R. 249. The opinion of the United States Circuit Court of Appeals for the Eighth Circuit (R. 258) is reported in 39 Fed. (2nd) 408.

Jurisdiction.

The decree of the Circuit Court of Appeals was entered March 8, 1930. (R. 266.) On May 6, 1930 (within the time provided by the then rules) petitioners filed petition for rehearing (R. 267) which was denied on June 26, 1930 (R. 268). Petition for certiorari was filed August 2, 1930. Certiorari was granted October 20, 1930. (R. 268.) Jurisdiction is conferred upon this court by Section 240 (a), of the Judicial Code as amended by Act of February 13, 1925. The court below, in reversing the decree of the trial court, held that a covenant in a written contract by which a customer of a natural gas utility, for a valuable consideration, agreed to take its requirements of natural gas for its two existing glass plants from the utility, at the rates fixed by public authority, so long as the utility could adequately supply same, was in partial restraint of trade and therefore contrary to public policy and void. (R. 261.) This decision (1) is in conflict with the decisions of the Circuit Courts of Appeal for the Tenth and Fifth Circuits on the same matter, (2) is untenable and in conflict with the weight of authority on an important question of general law and (3) is in conflict with the decision of the Supreme Court of Arkansas on an important question of local law. (Rule 38, Section 5.)

Question Presented.

Whether a covenant in an Arkansas contract between a public utility and one of its customers, by which the customer, an abnormally large user of natural gas, for a valuable consideration, agreed to purchase from the utility its requirements of natural gas for its two existing glass plants, at the rate fixed by public authority, so long as the utility could adequately supply same, is contrary to public policy and void.

STATEMENT OF THE CASE.

The court below reversed the decree of the trial court, and placed its decision upon the sole ground that a covenant in a written contract by which a customer of a natural gas utility, for a valuable consideration, agreed to take its requirements of natural gas for its two existing glass plants from the utility, at the rates fixed by public authority, so long as the utility could adequately supply same, was in partial restraint of trade, and, therefore, contrary to public policy and void, the announced theory for such a decision being that one of the parties to the contract was a public utility, and precluded, by reason of its status, from entering into a contract even in *partial* restraint of trade.

The controversy arose in this manner. In August, 1926, the respondent was taking the natural gas used by it at its two factories in the City of Fort Smith Arkansas, from the petitioner, Twin City Pipe Line Company. (R. 147.) The Twin City Pipe Line Company was engaged in the business of transporting gas by pipe line from gas fields adjacent to Fort Smith, Arkansas, to that city, where it sold same as a public utility under rates fixed by public authority, both to manufacturers and to the Fort Smith Light & Traction Company, which served domestic consumers. The Fort Smith Light & Traction Company was not connected with petitioners in any way, except that it was a customer. (R. 183.)

The petitioner, Industrial Oil & Gas Company, was engaged solely in producing natural gas (R. 154), and sold its entire production to petitioner, Twin City Pipe Line Company (R. 159), and these facts were known to respondent when the present contract was entered into.

(R. 159.) The petitioners were closely allied. At the time the contract was signed the majority of stock in each corporation was held by the same stockholders, but there was one large stockholder and director in Twin City Pipe Line Company who owned no stock in the Industrial Oil & Gas Company, and some stockholders in the Industrial Oil & Gas Company who owned no stock in Twin City Pipe Line Company. (R. 183-184.)

In the winter of 1925-1926, there had been a shortage of gas in Fort Smith, and growing out of that shortage and other controversies, litigation had ensued in which petitioners, respondent, and Fort Smith Light & Traction Company and S. H. Hale were parties.

In the decree in that consolidated cause (R. 110), the petitioner, Twin City Pipe Line Company, had obtained a judgment against respondent, Harding Glass Company, for $17,155.46, and Harding Glass Company had obtained a judgment over against Industrial Oil & Gas Company, for the same amount, and Harding Glass Company's prayer for injunction, specific performance, and damages was denied. See decree (R. 110) and opinions of trial court in that litigation. (R. 116, 129.) Appeals were taken from that decree to the Court of Appeals for the Eighth Circuit by Harding Glass Company (R. 112, 113) and by Industrial Oil & Gas Company. (R. 114.)

In August, 1926, the petitioners and respondent agreed to settle their differences, and the written contract, out of which the present litigation grew, was entered into. This contract is set out in full at (R. 144, 145), and is as follows:

> In consideration of the undertakings and agreements hereinafter set out to be done and performed by the Twin City Pipe Line Company and Industrial Oil & Gas Company and the Harding Glass Company, it is mutually agreed as follows:

(1) All judgments and decrees now entered for or against either of them or S. H. Hale, are to be satisfied and cancelled, and all former contracts between the Industrial Oil & Gas Company and the Harding Glass Company, and between the Twin City Pipe Line Company and the Harding Glass Company, are hereby abrogated as of September 1, 1926.

(2) All suits and appeals now pending between either of the parties hereto, or S. H. Hale, are to be dismissed and each party hereto, is to pay its own costs, all questions involved in said suits having been adjusted and settled.

(3) The Twin City Pipe Line Company agrees to lay at once an 8 inch pipe line from a connection with its 10 inch line at or near what is known as "The Carbarn" to a connection with its 8 inch line on Sixth Street near its regular station, said 8 inch line to run by the meter station where the gas furnished the Harding Glass Company is measured, and to be connected at said meter station with the lines furnishing the Harding Glass Company with gas.

(4) The Harding Glass Company agrees to take all its requirements of gas for its plants in the City of Fort Smith, Arkansas, from the Twin City Pipe Line Company so long as the Twin City Pipe Line Company can adequately supply its requirements and to pay for all gas furnished it hereunder, beginning September 1, 1926, at the regular sliding schedule of rates of twelve cents to fifteen cents, which is the rate now in effect for industries in the City of Fort Smith, Arkansas, or at such rate as may hereafter be fixed for industries in the City of Fort Smith by the proper regulatory body or court having jurisdiction. All gas consumed by the Harding Glass Company up to September 1, 1926, shall be paid for at the rate of ten cents per thousand cubic feet.

(5) The Harding Glass Company agrees that in the event there is a shortage of gas so that there is not enough to adequately supply the domestic consumer, that the Twin City Pipe Line Company may discontinue serving its gas, upon condition that the same character of service be given the Harding Glass Company that is given other industries in the

City of Fort Smith, Arkansas, and that his gas service be not discontinued unless that of other like industries is discontinued also.

Witness our hands this 30th day of August, 1926.

HARDING GLASS COMPANY,
By C. H. HARDING,
President.
INDUSTRIAL OIL & GAS COMPANY,
By W. R. MARTIN,
President,
TWIN CITY PIPE LINE COMPANY,
By W. R. MARTIN,
President.

I consent to the above.

S. H. HALE.

By the express terms of that contract, the petitioner, Twin City Pipe Line Company, was required to satisfy its judgment for $17,155.46 against respondent, Harding Glass Company, and the latter was required to satisfy its judgment over against Industrial Oil & Gas Company, and Industrial Oil & Gas Company and Harding Glass Company were required to dismiss their pending appeals, and Twin City Pipe Line Company agreed to build an additional pipe line for the benefit of Harding Glass Company—the right of Harding Glass Company to require Twin City Pipe Line Company to build such pipe line having been in issue and having been denied by the trial court in the litigation which was being settled. (R. 128, 252, 253.)

All covenants and agreements contained in this contract (save the covenant by which respondent agreed to take its requirements of gas from petitioner) were immediately, completely and fully performed by the parties. (R. 112, 113, 114, 145, 146, 253.) The pipe line was built at a cost of $4,489.82. (R. 146, 147.)

The clauses in the contract out of which the present suit grew are paragraphs four and five. (R. 145.) By

the terms of these paragraphs respondent "agrees to take all its requirements of gas for its plants in the City of Fort Smith, from the Twin City Pipe Line Company, so long as the Twin City Pipe Line Company can adequately supply its requirements," at the then existing rates for industries fixed by public authority, or at such changed rates as the public authorities may thereafter fix. (R. 145.)

Gas was taken and furnished pursuant to the above provisions down until January 2, 1929, at which time Harding Glass Company began to take practically all of its requirements from its own subsidiary corporations. (R. 149, 150, 208, 226, 227, 229, 230.)

The present suit was started when Harding Glass Company had announced its intention (R. 148-150) of violating the contract and taking its own gas from its own subsidiaries. No excuse or justification for this course of conduct was offered (R. 150, 226, 227) except the alleged invalidity of the contract.

This suit was brought to enjoin the respondent from violating its contract in the particulars set forth and a specific performance of the plain terms of that contract was sought and the bill concluded with a prayer for general relief. (R. 1-8.)

The trial court entered a decree enjoining respondent (R. 20) for reasons set forth in its unpublished opinion. (R. 249.) The Court of Appeals reversed this decree and remanded the cause with directions to dismiss plaintiffs' bill (R. 266-267), upon the sole ground that such a "requirements" contract was in *partial* restraint of trade, and that where one of the parties is a public utility and the other party is one of its customers, a contract even in partial restraint of trade is contrary to public policy. (R. 261.) This court granted certiorari. (R. 268.)

SPECIFICATIONS OF ERRORS TO BE URGED.

The Circuit Court of Appeals erred:

1. In not holding that a covenant in an Arkansas contract between a public utility and one of its customers, by which the customer, an abnormally large user of natural gas, for a valuable consideration, agreed to purchase from the utility its requirements of natural gas for its two existing glass plants, at the rates fixed by public authority, so long as the utility could adequately supply same, is valid and enforceable.

2. In holding that a covenant in an Arkansas contract between a public utility and one of its customers, by which the customer, an abnormally large user of natural gas, for a valuable consideration, agreed to purchase from the utility its requirements of natural gas for its two existing glass plants, at the rate fixed by public authority, so long as the utility could adequately supply same, is contrary to public policy and void.

SUMMARY OF ARGUMENT.

Point One.

THE DECISION OF THE COURT BELOW IS IN CONFLICT WITH THE DECISION OF OTHER CIRCUIT COURTS OF APPEAL ON THE SAME MATTER.

Point Two.

THE DECISION OF THE COURT BELOW DECIDES AN IMPORTANT QUESTION OF GENERAL LAW IN A WAY THAT IS UNTENABLE AND IN CONFLICT WITH THE WEIGHT OF AUTHORITY.

Point Three.

THE DECISION OF THE COURT BELOW IS IN CONFLICT WITH THE APPLICABLE LOCAL DECISIONS ON AN IMPORTANT QUESTION OF LOCAL LAW.

ARGUMENT.

Point One.

THE DECISION OF THE COURT BELOW IS IN CONFLICT WITH THE DECISION OF OTHER CIRCUIT COURTS OF APPEAL ON THE SAME MATTER.

The court below, in holding the contract void, puts its decision on the ground that one of the parties is a public utility, and therefore, for that reason alone, precluded from entering into a contract which can be construed as being even in partial restraint of trade.

A diametrically opposite conclusion is reached by the Court of Appeals for the Tenth Circuit, in passing upon an essentially similar natural gas "requirements" contract *between a public utility* and the City of Iola, Kansas, *one of its customers.*

Griffin, et al. v. *Oklahoma Natural Gas Corporation*, 37 Fed. (2nd) 545.

That court affirmed a decree which enjoined the customer from taking from another its natural gas requirements for the operation of its municipal plant and for resale to the inhabitants of the city, holding in answer to the plea that the contracts were void because in restraint of trade, that the contracts were reasonable, and therefore valid, even though in *partial* restraint of trade.

The following short quotations from the opinion of the court below, and from the opinion in the Griffin case sharply illustrate the conflict between the two decisions on the same matter.

The Court of Appeals for the Eighth Circuit, in its opinion in the present case, (R. 261) quoted with ap-

proval from the decision in *Coombs* v. *Burke*, 40 Cal. App. 8, as follows:

> "Whatever tends to prevent competition in business impressed with a public character is opposed to public policy and is therefore unlawful." (Greenhood on Public Policy, p. 180.)
>
> "Where a contract affects such character of business, since no restraint, however partial, can be tolerated, the court will not inquire into or consider the extent of the restriction imposed. *Gibbs* v. *Consolidated Gas Co.*, 130 U. S. 396 (and other cases). As to private business, the conduct of which does not affect the public welfare, and hence involves no question of public policy, a different rule applies, under which contracts, if reasonable in their terms, will be enforced."

But the Court of Appeals for the Tenth Circuit in the Griffin case first pointed out that the City of Iola, in its "business" capacity, had entered into a contract to take from appellee's assignor "all the natural gas required by the city for fuel in the operation of its electric light and water plant," and then said in affirming a decree which enjoined a breach of that contract:

> "Counsel for the City and Griffin further contend that the contracts are void because in restraint of trade. If the restraint were reasonable, under the particular facts and circumstances of the case, the contracts are not invalid because of such restraint." *Gibbs* v. *Consolidated Gas Co.*, 130 U. S. 396 (and other cases).

The two cases cannot be differentiated on the facts. An analysis of the undisputed facts, in the two cases, simply accentuates the conflict between these decisions on the question of law.

Both cases involved a contract for the supply of the fuel requirements of an existing industrial plant by a public utility. In the Griffin case the plaintiff, a public utility acquired the contract with the City of Iola by mesne assignments from J. B. Kirk Gas & Smelting Co.

Both contracts were supported by an adequate consideration. In the instant case, that consideration was not simply the mere agreement on the part of the utility to furnish the fuel. An important consideration, which supported the covenant of the customer, was the settlement of the then pending litigation between the parties. The petitioner, Twin City Pipe Line Company, pursuant to the covenants contained in the contract requiring it to do so, (R. 145) satisfied a judgment which it had obtained against the customer amounting to more than $17,000, (R. 110-111) and in addition thereto, and pursuant to the terms of the contract built a pipe line at an expense of over $4,000, (R. 146-147) which the trial court in the previous litigation had held it was not obligated to build, (R. 128, 252-253) and the petitioner, Industrial Oil & Gas Company, dismissed its pending appeal. (R. 114-115.) The adequacy of this consideration cannot be questioned.

Mississippi River Logging Co. v. *Robson* (C. C. A. 8th) 69 Fed. 773.

The very terms of the contract, and the character of consideration, moving from the utility, show that the contract was entered into primarily for the purpose of settling pending litigation between the parties, and for the protection of necessary investment of the utility to serve this particular and abnormally large customer, and that it was not part or parcel of any scheme by which the utility sought to tie up industries generally in order to avoid competition. There is no evidence in the record that any similar contract was entered into with other industries.

Carter-Crume Co. v. *Peurrung,* (C. C. A. 6th) 86 Fed. 439.

The contract in the instant case was made between the

utility and a window glass company, while the contract in the Griffin case was between a utility and a municipal corporation. But the opinion in the Griffin case makes plain that the city entered into the contract in that case in its "business" and not in its "governmental" capacity, so there is no distinction between the cases on this ground.

In the Griffin case the utility spent large sums of money after the contract was signed in putting itself in position to furnish the gas. In the instant case one petitioner built a $4,000 pipe line in compliance with the contract, (R. 146-147), while the other has spent over $70,000 in drilling new gas wells to the end that respondent might be adequately supplied. (R. 154-155.)

The contracts in the Griffin case ran for a term of five years, but further provided that the utility should not be required to furnish gas nor be liable for shortage caused by failure of gas in the territory from which the utility obtained its supply, or because of failure of the pressure of the gas wells.

The contract in the case at bar was for as long as the utility could adequately supply the gas. The industry had been buying gas from the utility for a number of years and knew its course of supply, (R. 154-159) and the testimony of respondent's own president makes plain that a contract for a shorter period of time, in view of the improvements which it contemplated, and the character of manufacturing in which it was engaged, would have been of no value to it. (R. 223, 224, 226, 228.)

In other words, no window glass manufacturer would *contract* for gas for a less period of time than the life of the gas field, and in view of the known exhaustibility of gas fields, it is difficult to see how the contract could be condemned as unreasonable on this ground. The sub-

ject matter of the contract, natural gas, when taken in connection with the character of business in which the manufacturer was engaged, demanded a contract for the life of the gas field. In this connection, see *Webster* v. *Williams,* 62 Ark. 101, and *Fowle* v. *Park,* 131 U. S. 88, both of which are discussed hereafter.

The opinion of the court below emphasizes throughout the inability of a public utility to enter into a contract, whether with its customers or others, which involves any restraint of trade, however partial, while a "requirements" contract, such as is involved in both cases, is recognized as reasonable and valid by the Court of Appeals for the Tenth Circuit in the Griffin case, and no distinction is made in that case, because the person supplying the customer happens to be a public utility.

The decision of the court below is also in direct conflict with the decision of the Circuit Court of Appeals for the Fifth Circuit in the case of *Montgomery Traction Co.* v. *Montgomery Light and Water Power Co.,* 229 Fed. 672. The contract in that case obligated the traction company to purchase from the power company "exclusively for the period of fifteen years * * * such direct electrical current * * * as it may require for propelling, lighting and heating its passenger and freight cars" and other purposes, in and about the City of Montgomery, Alabama. The traction company attempted to discontinue receiving electrical current from the power company and take it from another source. The power company instituted suit to enjoin the traction company from receiving current from any person other than the power company. A demurrer to the bill was overruled by the trial court for the very cogent reasons set forth in its opinion reported as *Montgomery Light and Water Power Co.* v. *Montgomery Traction Company,* 191 Fed. 657. After a hearing on the merits, the trial court en-

tered a decree perpetually enjoining the traction company from taking electrical current from any person other than the power company during the term covered by the contract and so long as the power company performs its part of the contract. *Montgomery Light and Water Power Co.* v. *Montgomery Traction Co.*, 219 Fed. 963. After a hearing on the merits, the trial court entered a decree perpetually enjoining the traction company from taking electrical current from any person other than the power company during the term covered by the contract and so long as the power company performs its part of the contract. This decree was affirmed by the Circuit Court of Appeals, Fifth Circuit, in the case above referred to.

The contract in the Montgomery case is almost identical with the case at bar and the relief granted by the decree in that case is in accord with the views expressed in the opinion of the trial court in the case at bar.

The decision below is in conflict with the decisions of the Court of Appeals for the Fifth Circuit in the *Montgomery Case* and with the decision of the Court of Appeals for the Tenth Circuit in the *Griffin Case*, both of which are in accord with the great weight of authority.

Point Two.

THE DECISION OF THE COURT BELOW DECIDES AN IMPORTANT QUESTION OF GENERAL LAW IN A WAY THAT IS UNTENABLE AND IN CONFLICT WITH THE WEIGHT OF AUTHORITY.

The validity of contracts whereby a purchaser promises to buy his "requirements" of a commodity from a seller, has been sustained in nearly every jurisdiction in the United States. Indeed, it would be difficult to find a principle of law more definitely established than the

doctrine applicable to the validity of requirements contracts.

The following cases uphold the validity of such contracts:

Bulkley v. *United States* (1874), 19 Wall. 37.
Brawley v. *United States* (1878), 96 U. S. 168.
Parish v. *United States* (1886), 100 U. S. 500.
Smoot v. *United States* (1915), 237 U. S. 38.
United States v. *Purcell Envelope Co.* (1919), 249 U. S. 313.
Pittsburg Plate Glass Co. v. *H. Neuer Glass Co.* (C. C. A. 6th, 1918), 253 Fed. 161.
Lima Locomotive & Machine Co. v. *National Steel Castings Co.* (C. C. A. 6th, 1907), 155 Fed. 77.
Manhattan Oil Co. v. *Richardson Lubricating Co.* (C. C. A. 2nd, 1902), 113 Fed. 923.
Marx v. *American Malting Co.* (C. C. A. 6th, 1909), 169 Fed. 582.
T. W. Jenkins & Co. v. *Anaheim Sugar Co.* (C. C. A. 9th, 1918), 247 Fed. 958.
Rockhill Iron & Coal Co. v. *City of Taunton* (C. C. A. 1st, 1921), 273 Fed. 96.
National Pub. Co. v. *International Paper Co.* (C. C. A. 2nd, 1920), 269 Fed. 903.
Texas Co. v. *Pensacola Maritime Corp.* (C. C. A. 5th, 1922), 279 Fed. 19. (See also 292 Fed. 61; 300 Fed. 51.)
Mills-Morris Co. v. *Champion Spark Plug Co.* (C. C. A. 6th, 1925), 7 Fed. (2nd) 38.
Sterling Coal Co. v. *Silver Spring Bleaching & Dyeing Co.* (C. C. A. 1st, 1908), 162 Fed. 848.
Conley Camera Co. v. *Multiscope & Film Co.* (C. C. A. 8th, 1914), 216 Fed. 892.
Diamond Alkali Co. v. *P. C. Tomson & Co. Inc.* (C. C. A. 3rd, 1929), 35 Fed. (2nd) 117.

Tampa Shipbuilding & Eng. Co. v. *General Const. Co.* (C. C. A. 5th, 1930), 43 Fed. (2nd) 309.

Ehrenworth v. *George F. Stuhmer & Co., Inc.* (1920), 229 N. Y. 210.

Lone Star Gas Co. v. *Municipal Gas Co.* (1928), 117 Tex. 331.

Cox, Inc. v. *Humble Oil & Refining Co.* (1929), Comm. of App. Tex. 16 S. W. (2nd) 285.

Big Four Ice & Cold Storage Co. v. *Williams* (1928), Court Civ. App. Tex. 9 S. W. (2nd) 177.

Minnesota Lumber Co. v. *Whitebreast Coal Co.* (1895), 160 Ill. 85.

Jackson Hill Coal & Coke Co. v. *Merchants' Heat & Light Co.* (1923), 193 Ind. 422.

C. G. Blake & Co., Inc. v. *W. R. Smith & Son, Limited* (1926), 147 Va. 960.

Hendler Creamery Co. v. *Lillich* (1927), 152 Md. 190.

Elk Refining Co. v. *Falling Rock Cannel Coal Co.* (1922), 92 W. Va. 479.

Home Gas Co. v. *Mannington Co-Operative Window Glass Co. et al* (1907), 63 W. Va. 266.

Albany Power & Mfg. Co. v. *City of Albany* (1909), 133 Ga. 375.

O'Bryan v. *Mengel Co.* (1928), 224 Ky. 284.

Freedom Oil Works Co. v. *Williams* (S. C. Penn. 1930), 152 Atl. 741.

Requirements contracts such as we have in the case at bar and in the Griffin and the Montgomery cases are commonplace. Under such contracts various requirements of the government have been supplied. Thus, in *Bulkley* v. *United States, supra,* the contract was for the transportation of supplies from Fort Leavenworth to

army posts farther west "which might be required by the government"; in *Parish* v. *United States, supra,* the "whole amount of ice required" at certain designated points by Union armies in the field, was contracted for by the government; in *Brawley* v. *United States, supra,* the contract was construed by this court as an engagement to furnish all of the wood "determined to be necessary by the post commander for the regular supply (of Fort Pembina) for the year, in accordance with army regulations." The contract involved in *United States* v. *Purcell, supra,* obligated the post office department to purchase "stamped envelopes and newspaper wrappers in such quantities as may be called for by the department" during a four-year period; in *Smoot* v. *United States, supra,* the government contracted to purchase "the filter sand required by the United States for a filtration plant."

It is a common business practice for manufacturers to contract for the purchase of their requirements of fuel or material. In *Lima Locomotive and Machine Co.* v. *National Steel Castings Co., supra,* the contract covered all the requirements of a manufacturer for steel castings for the remainder of the present year; in *Marx* v. *American Malting Co., supra,* a brewery contracted for "all their requirements" of malt to a certain date; in *Rockhill Iron & Coal Co.* v. *Taunton, supra,* the contract covered all the bituminous coal required by a municipal electric light plant for a year and one-half period; in *National Publishing Co.* v. *International Paper Company, supra,* a newspaper publisher contracted to buy "the entire supply of half-tone newspaper required to print rotogravure supplements" for a period of one year; in *Sterling Coal Company* v. *Silver Springs Dyeing Company, supra,* a manufacturer contracted for its "entire consumption of coal" for a certain period of time.

In West Virginia where natural gas has been available for fuel in recent years, the fuel requirements of manufacturers have been purchased under requirements contracts. For example: In *Elk Refining Co.* v. *Falling Rock Cannel Coal Co., supra,* the fuel requirements for a refinery were provided for under a contract containing the following terms: "The seller agrees to sell and the buyers agree to buy all the natural gas that they may need for lights, fuel or other purposes for which gas may be used in connection with the operation of said refinery."

In *Lone Star Gas Co.* v. *Municipal Gas Co.* (1928), 117 Tex. 331, a gas distribution company contracted to purchase its needs and requirements of natural gas from a producing company. *Both companies were public utilities.* The seller proposed to forfeit the contract for alleged breaches by the buyer. The buyer filed suit to enjoin forfeiture and for specific performance of the contract. The case went to the Supreme Court of Texas on the pleadings. That court held that the contract was valid and that the buyer upon proof of its allegations would be entitled to specific performance of the agreement.

In *Home Gas Co.* v. *Mannington Co-Operative Window Glass Co. et al.* (Supreme Court of Appeals, West Virginia, 1907), 63 W. Va. 266, a natural gas company had contracted to sell gas for five years in quantities sufficient to supply a "window glass manufactory of at least 12 pots." The Gas Company's supply failed. The Glass Company discontinued purchasing gas from the Gas Company, acquiring its needs elsewhere. The Glass Company had brought an action at law for damages for the failure of the Gas Company to supply sufficient gas. This bill was brought by the Gas Company to restrain the Glass Company's action

at law on the basis that there had been fraud in making the contract, in that the gas requirements had been misrepresented. The Supreme Court of Appeals dismissed the Gas Company's bill and held the contract to be a valid contract obligating the gas company, *a public utility,* to furnish to the glass company all the gas required for the specified plants. This case is directly in point.

In *Albany Power & Mfg. Co.* v. *City of Albany* (Supreme Court of Ga. 1909), 133 Ga. 375, a power company had contracted to furnish such electric current to the city "as said party of the second part may require for its own purpose." The power company brought suit to recover a specified amount on the theory that it constituted a minimum charge under the contract. The court held *that the contract was a "requirements contract"* and that the city was liable for energy actually used. This case presented the same question involved in the case at bar.

In *Ehrenworth* v. *George F. Stuhmer & Co., Inc.* (1920), 229 N. Y. 210, the Court of Appeals of New York sustained a judgment allowing recovery in an action at law brought by a bread peddler for violation of an oral contract, enduring as long as the parties remained in business, whereby the peddler promised to purchase from the defendant all the black bread that he would require. Such a contract indicates a strong tendency to monopoly because the plaintiff had promised to sell no other kind of black bread in his territory. Although that contract, made between a baker and a middleman, directly affected the bread supply of the whole buying public in his territory, *the question of partial restraint of trade was not even mentioned.*

In *Cox, Inc.* v. *Humble Oil & Refining Co.* (1929), 16

S. W., 2nd, 285, the Commission of Appeals of Texas affirmed a judgment which allowed recovery on a contract wherein the plaintiff promised to take all gasoline used in his filling station from the defendant. *Although the question of restraint of trade was introduced in the case, the court specifically held that the contract was a valid and enforceable contract.* The contract was similar to the contract between the Harding Glass Company and the Twin City Pipe Line Company.

Requirements contracts assure the buyer of an adequate and continuous supply of the commodity needed at all times without subjecting him to risks of loss incident to contracts providing for the purchase of a specified quantity at a designated time. Without the assurance of distribution which such contracts give, it would be extremely hazardous for sellers to carry on extensive development of natural resources or to expand equipment for manufacturing. To vitiate such contracts is to condemn a well recognized business practice without promoting or protecting any public interest.

The decision of the court below is in direct conflict with the weight of authority on the question of the validity of requirements contracts. It announces a new doctrine applicable only to one class of requirements contracts—the requirements contracts of a public utility. It excepts such contracts from the application of the universally recognized rule sustaining the validity of requirements contracts, on the sole ground that such contracts, when made by a public utility for the sale of its commodity are in partial restraint of trade and therefore against public policy and void.

Undoubtedly, all requirements contracts have some tendency to restrain the absolute freedom of trade. A manufacturer using coal for fuel in his operations agrees

to buy five hundred tons during the winter of 1930; such a contract might, by a process of reasoning, be said to be in partial restraint of trade because it would prevent a competitor of the seller from supplying a part of the coal, yet it would hardly be urged that such a contract is illegal because in partial restraint of trade. Certainly the character and effect of such a contract would not be changed merely because the seller was a public utility and the commodity sold was gas or electricity instead of coal. Yet the court below makes a distinction in the application of the doctrine to such contracts. This distinction is not justified in reason (1) because it is apparent that a contract of this character between a public utility and an abnormally large industrial user of its service is reasonably required as a matter of sound business in order to protect the large investment that the utility must make in order to serve adequately such a customer; otherwise the customer is left free to abandon at any time the use of the investment in plant and line capacity or the development of gas producing territory (as in the case at bar) made specially to serve it, and it is apparent that such a course must lead to business disaster or at least must seriously cripple the utility in its ability to serve properly the general public, and (2) because it is apparent that a "requirements" contract between a public utility and a large industrial user of its service is far less susceptible to attack for illegality based upon monopolistic tendencies than similar contracts of purely private corporations where, as in the case at bar, the rates and service of the public utility are regulated by public authority. Under Act 124 of the Acts of Arkansas 1921 (applicable section quoted in Appendix), the City Commission of the City of Fort Smith is vested with the power to make all reasonable and proper rules and regulations with refer-

ence to the operations of the Twin City Pipe Line Company within the municipality (including the power to fix and regulate rates and to order the performance of any duty devolving on it under its franchise or contracts); outside the corporate limits of the municipality the power of regulation is vested in the Arkansas Railroad Commission. Private corporations are, of course, not subject to such regulation. It is impossible to divorce the business of a public utility from business considerations logical to the conduct of all business.

By the terms of the contract, involved in the present case, the Pipe Line Company did not agree not to sell gas to others. It did not agree to limit or to restrict its business as a public utility. The gas, to be furnished under the terms of the contract, was to be furnished at the then legally established rates, or at such rates as the public authorities might thereafter establish. The Harding Glass Company did not agree that it would not build other plants, or in the event that it did do so, did not agree to take its gas for such new plants from petitioner. It simply agreed to buy its requirements for its existing plants from the petitioner.

The court below quotes with approval from *Coombs* v. *Burke*, 40 Cal. App. 8, on the proposition that where a contract affects a business impressed with a public interest no restraint, however partial, nor however reasonable, can be tolerated. The opinion in that case was announced by an intermediate court of the State of California in 1919, and has never been cited or approved by any other court, except by the court below in the case at bar. The authorities cited in the Coombs case do not support the sweeping doctrine announced.

The court below, cites *Gibbs* v. *Consolidated Gas Company*, 130 U. S. 396. In that case the plaintiff brought suit

for services in negotiating and consummating a contract between the defendant gas company and its rival and competitor in the gas business in the City of Baltimore. By that contract the parties expressly agreed that they would no longer compete, although such agreement, at least as to one company, was "directly in the teeth of the statute" (of Maryland) which specifically forbade any such agreement. By the terms of the contract one of these competitors was given the authority to fix the prices to be charged by both, and their joint profits were to be divided in accordance with provisions set forth in the contract. Neither party was to solicit the customers of the other, and one of the parties was forbidden to extend its lines, thus disabling itself from performing its public duties. General expressions in the opinion are, of course, applicable to the particular facts before the court. The Court of Appeals for the Tenth Circuit cites the Gibbs case in support of the conclusion reached by it in *Griffin, et al.* v. *Oklahoma Natural Gas Corporation* (*supra*). A contract similar to that involved in the Gibbs case, between private individuals, would be contrary to the public policy of Arkansas. *Shapard* v. *Lesser*, 127 Ark. 590.

Another case cited below is *West Virginia T. Co.* v. *Ohio R. P. L. Co.*, 22 W. Va. 600. This case had to do with the granting of an exclusive easement for laying pipe lines, one of the conditions of the easement being a restriction on the grantor not to grant similar easements to any other parties. Its relevance to the contract involved in the present case is more than doubtful, especially in view of the later West Virginia cases which uphold "requirements" contracts of a manufacturer for his gas supply. *Home Gas Co.* v. *Mannington Co-Operative Window Glass Co., et al.*, 63 W. Va. 266; *Elk Refining Co.* v. *Falling Rock Cannel Coal Co.*, 92 W. Va. 479.

In the case of *Salt Co.* v. *Guthrie* (1880), 35 Ohio State 672, also cited in the opinion below, it appeared that all the salt manufacturers within a large salt producing territory by written agreement formed a voluntary association, the stated purpose of which was to regulate the price of salt manufactured by its members. The court properly held such an agreement was in general, not partial, restraint of trade and therefore void on the grounds of public policy. It is apparent the case has no bearing upon the case at bar.

In the case of *Perceval* v. *Public Service Commission*, 163 App. Div. 705, 707, cited in the opinion below it appeared that a public utility supplying electric current required of all applicants for service an agreement that applicants would not take electric current from any other source. The relator refused to sign such an agreement as it desired to take its service during the day from an adjoining factory. The court held the utility must give the service and could not require the agreement. This case is not analogous to the case at bar where no conditions were imposed to giving to the Glass Company the exact amount of service it requested except that the amount of gas applied and contracted for should be used for a period reasonably adapted to protect the investment required to give that service.

Central New York Telephone & Telegraph Co. v. *Averill*, 199 N. Y. 128; *United States Telephone Co.* v. *Central Union Tel. Co.*, 202 Fed. 66; *Gwynn* v. *Citizens Telephone Co.*, 69 S. C. 434; and *Union Trust & Savings Bank* v. *Kinlock Long Distance Tel. Co.*, 258 Ill. 202, likewise cited below, all involve contracts for telephone service which would directly inconvenience and injure the public by curtailing and restricting the service available to telephone users generally. This is aptly expressed

by the Court of Appeals of New York in the *Averill case* as follows:

> "The feature of the modern telephone system which constitutes its public value and affects it with a public interest is its ability to bring each customer into vocal communication with hundreds and oftentimes thousands of others. This makes it an instrument of great public convenience and utility, the usefulness of the service offered by each company being directly proportionate to the number of persons who can be reached thereby. * * *
>
> In return for the franchise which a telephone corporation receives from the state—including as it does the privilege of occupying highways and the right to exercise the power of eminent domain—it undertakes to furnish each customer with telephone service to as many other customers as it can obtain at the rates which the law permits it to charge; and the law implies an obligation on its part to do nothing to lessen the facilities of the public to procure a more widely extended service. * * *
>
> It is true that the customers who had voluntarily entered into the agreement of exclusion would have no just ground of complaint themselves; but how about the customers of the rival company who are thereby shut out from communication by telephone with their neighbors? They are not parties to the contract, and yet they suffer its consequences, although they constitute a portion of the public for whose benefit the franchise was granted to the corporation whose action deprives them of the more extended telephone service which otherwise they might enjoy.
>
> It is on this broad ground that I think we ought to condemn the exclusive clause of this contract as against public policy, and therefore void."

Reasonably adequate service on the part of the telephone company was described by the Court of Appeals of the Sixth Circuit in the *United States Telephone Company case, supra*, as follows:

> "A long-distance telephone service is not necessarily reasonably adequate just because it reaches the city or district of residence of the person with

whom communication is desired. A railroad service may be beyond criticism if all passengers and freight are delivered at one station in a city, from which station the passengers go their several ways, and to which station consignees come for their freight; a telegraph service may be complete if the messages reach over the wire only one central office, from which they are distributed by other means; but in telephone communication the ultimate thing sought is personal conversation, and a long-distance telephone service has not reached its full usefulness until the user, in one place, can talk directly with the residence or place of business of the telephone users in another place. It is not now important where the line will be drawn in determining what is reasonably adequate service. That will depend upon many conditions, some of which cannot be foreseen. It is enough to say that where a local telephone company contracts that it will not send or receive any long-distance messages, excepting in cooperation with one specified long-distance company, it thereby abdicates its power to give a service which may turn out to be clearly within any proper definition of 'reasonably adequate'."

The character of the contracts considered in the above cases is essentially different from that involved here. An exclusive contract between a telephone company and one of its customers impairs the very element—intercommunication between the largest number of persons—which it is the very purpose of telephone service to promote. This element is wholly absent from contracts for gas service. A requirements contract between a gas utility and a large gas consumer, such as we have in the case at bar, does not directly or indirectly affect the adequacy of the service to other consumers or to the public generally. The Harding Company can only consume so much gas at its existing plants. It makes no difference to the public, whether the Harding Company takes all of its fuel requirements from the Twin City Company, or whether it splits its fuel requirements between that

company and its own subsidiary. The Harding Company cannot consume more gas at its two plants than it needs.

In the *Kinlock Long Distance Telephone Company case* the Illinois Supreme Court pointed out that there was little analogy between cases involving exclusive contracts of telephone companies and those involving contracts of railroad companies for the exclusive use of sleeping cars, express cars, wharves and docks because of the essential difference in the character of such contracts, in the nature of the use to be made of the property, in the character of the service to be rendered, and in the agents to be employed and agencies maintained.

We submit, therefore, that the telephone cases cited by the court below are not in point because of the essential difference in the character of the contracts involved and in the essential difference in the business of a telephone company and a gas company and the character of the service rendered by each.

Chicago Gas Light & Coke Co. v. *People's Gas Light & Coke Co.*, 121 Ill. 530; *Charleston Nat. G. Co.* v. *Kanawha Nat. G. L. & F. Co.*, 58 W. Va. 22; *State* v. *Portland Nat. Gas & Oil Co.*, 153 Ind. 483; and *City of Detroit* v. *Mutual Gas Co.*, 43 Mich. 594, cited by the court below, involved contracts providing for the division of territory between competing gas companies and combinations of rival gas companies.

The case of *Bald Eagle Valley R. Co.* v. *Nittany Valley R. Co.*, 171 Pa. 284, involved a contract whereby an iron company agreed to give all its traffic to a railway company. This case was dismissed by the court below as "stating the public policy of Pennsylvania." The Pennsylvania court in holding the contract valid did not base its decision on the public policy of Pennsylvania in

regard to contracts of public utilities said to be in partial restraint of trade because the court expressly held in regard to the contract that "it is not in restraint of trade for its express purpose and necessary effect are to increase both trade and population."

The remaining authorities cited by the court below, in support of its opinion, undoubtedly sustain the general principles of law in respect to monopoly and combinations in restraint of trade set forth therein. We believe it evident, however, that those general principles are not applicable to or determinative of the case at bar.

"Requirements" contracts have been sustained by this court in *Bulkley* v. *United States, supra; Brawley* v. *United States, supra; Parish* v. *United States, supra; Smoot* v. *United States, supra;* and *United States* v. *Purcell Envelope Co., supra.* No decision by any court has come to our attention (except possibly the *Coombs case*) holding invalid a "requirements" contract of the character involved here between a public utility and one of its customers, because in partial restraint of trade, while the Circuit Court of Appeals for the Tenth Circuit, in *Griffin, et al* v. *Oklahoma Natural Gas Corp., supra,* the Circuit Court of Appeals for the Fifth Circuit in *Montgomery Traction Co.* v. *Montgomery Light & Water Power Co., supra,* the Supreme Court of Texas in *Lone Star Gas Co.* v. *Municipal Gas Co., supra,* the Supreme Court of Appeals of West Virginia in *Home Gas Co.* v. *Mannington Co-Operative Window Glass Co. et al, supra,* and the Supreme Court of Georgia in *Albany Power & Mfg. Co.* v. *City of Albany,* have upheld the validity of such contracts by public utilities.

We submit, therefore, that the decision of the court below is untenable and is not sustained by reason or authority.

Point Three.

THE DECISION OF THE COURT BELOW IS IN CONFLICT WITH THE APPLICABLE LOCAL DECISIONS ON AN IMPORTANT QUESTION OF LOCAL LAW.

The court below, in its opinion, said:

> "The public policy to be ascertained is the public policy of Arkansas. *Northwestern Life Insurance Co.* v. *Johnson*, 254 U. S. 96."

and

> "The Constitution of Arkansas (Art. 11, Sec. 19) contains this provision: 'Perpetuities and monopolies are contrary to the genius of a republic and should not be allowed.' No specific determination is found in the statutes or decisions of the Supreme Court of Arkansas applicable to the exact situation. That Court has decided many questions involving alleged restraints of trade, (citing cases) in recognition of the *common law principles applicable.*" (Italics ours.)

It is perfectly obvious from what is quoted above and from the entire opinion, that the court below based its decision upon its own conception of what the public policy of Arkansas should be, after having reached the conclusion that it was not precluded from so doing by the local statutes or decisions.

But it must be conceded that the Supreme Court of Arkansas has said that contracts between private individuals are valid when only in partial restraint of trade. The case of *Webster* v. *Williams*, 62 Ark. 101, is cited by the court below. In that case a contract of a physician to retire permanently from the practice of medicine in a given city was upheld against the plea that such a contract was in unreasonable restraint of trade. The facts in that case and the opinion of the court are on all fours with the facts and the opinion in the case of *Mills*

v. *Ressler*, 87 Kansas, 549, cited by the Court of Appeals for the Tenth Circuit, in the Griffin case.

In the case of *Keith* v. *Herschberg*, 48 Ark. 146, a contract which gave to a merchant the exclusive right to sell a particular character of goods in the town of Booneville was upheld against the contention that it was in unreasonable restraint of trade and, therefore, void.

These two cases are cited with approval by the Supreme Court of Arkansas in *Fort Smith Light & Traction Company* v. *Kelley*, 94 Ark. 461. This case was relied upon by the trial court in its opinion, (R. 252) but was ignored by the Court of Appeals for the Eighth Circuit in its opinion. The 6th syllabus of that case (page 462) reads as follows:

> "A contract whereby a person agrees not to supply natural gas in a certain city is only in partial restraint of trade, and, is therefore, not void."

In that case the contract was between two parties, both of whom were engaged in the public business of supplying natural gas. It was contended by Kelley that, "If the contract did undertake to exclude defendants from Fort Smith for forty-nine years, it would be a restraint of trade and competition, against public law and policy, and unenforceable."

The Supreme Court of Arkansas answered this contention (page 475) in part, as follows:

> "But, should we be mistaken in holding that the contract is not one in restraint of trade, then we are of the opinion that at most, it could only be a contract in *partial* restraint of trade. *Under all the authorities and our own decisions, such contracts, when reasonable, are not against public policy, and therefore are not void. Keith* v. *Herschberg Optical Co.*, 48 Ark. 146; *Webster* v. *Williams*, 62 Ark. 101." (Italics ours.)

Further along in the opinion the Supreme Court of Arkansas said:

> "That courts of chancery will grant relief by injunction to prevent a breach of contract in partial restraint of trade is well settled."

Here was a contract which involved exactly the same public business which is involved in the present case. It was a contract which involved supplying gas to all of the inhabitants of the City of Fort Smith, and the contract ran for a period of forty-nine years. Yet, the Supreme Court of Arkansas, applying the same rule to this contract that it had previously applied to contracts between individuals, held that the contract was not invalid because it was only in *partial* restraint of trade.

In the later case of *Kimbrough* v. *Wells,* 112 Ark. 126, 130, the case of *Fort Smith Light & Traction Co.* v. *Kelley, supra,* and the case of *Webster* v. *Williams, supra,* were cited with approval in upholding a contract which was in partial restraint of trade.

Counsel for respondents, in their brief in opposition to the granting of petition for certiorari, made some point on the section of the Arkansas Constitution of 1874, which was quoted, but very apparently not relied upon by the court below in its opinion. This section of the Arkansas Constitution was in force when all of the above decisions of the Supreme Court of Arkansas were handed down. In other words, that section of the Arkansas Constitution has never been considered by the Supreme Court of the state as prohibiting contracts in partial restraint of trade. Moreover, that court has held that a monopoly may be granted to a public utility by or under the authority of an act of the legislature, notwithstanding this section of the Constitution. As construed by the Supreme Court of Arkansas, that section prohibits the granting of monopolies by the legislature only in connection with

businesses which are open as a matter of common right to all and for the conduct of which no franchise from the state or subdivision thereof is required.

The case of *Cap F. Bourland Ice Co.* v. *Franklin Utilities Co.*, 180 Ark. 770, makes this entirely clear. The proposed monopoly in the ice business involved in that case was condemned solely on the ground that the conduct of the ice business is a matter of common right and requires no franchise for its conduct. The court in that case expressly recognizes the validity of exclusive franchises to public service companies and bridge companies and for ferries.

The statutes of Arkansas authorize municipalities to grant exclusive franchises for gas, electric light, and other utilities. C. & M. Digest, Section 7492, which amended Kirby's Digest, Sec. 5448 (both quoted in appendix). The validity of this Section has been recognized in *City of Eldorado* v. *Coates*, 175 Ark. 289, and *Cap F. Bourland Ice Co.* v. *Franklin Utilities*, 180 Ark. 770, and an exclusive franchise granted under this section (Kirby's Digest, 5448) was upheld in *Lackey* v. *Fayetteville Water Company*, 80 Ark. 108, 125, 135. Similar statutes relative to toll bridges and ferries have been upheld by that court in *McClintock* v. *Bovay*, 164 Ark. 482, and *McClintock* v. *White River Bridge Co.*, 171 Ark. 943.

It is difficult to understand on what theory a contract of a gas utility, said to be only in *partial*, restraint of trade, which clearly does not create a monopoly and is only claimed to *tend* in that direction, can be held to be illegal as opposed to the public policy of Arkansas when the statutes and decisions of the Supreme Court of that state expressly declare that a monopoly on the part of a gas utility is not illegal.

The test, and the only test which the Supreme Court of Arkansas has laid down with reference to contracts in partial restraint of trade, is the reasonableness of the contract. This is the same rule announced by the Court of Appeals for the Tenth Circuit in the Griffin case. No distinction is made by the Supreme Court of Arkansas by reason of the fact that one of the parties to the contract is a public utility. *Fort Smith Light & Traction Co.* v. *Kelley, supra.* In announcing a contrary rule, the court below has adopted a public policy for the State of Arkansas, in the federal courts, which is contrary to the public policy enforced in the state courts.

It was argued in respondent's brief in opposition to the granting of the writ of certiorari, that the contract is unreasonable because it is for the life of the gas field. In *Webster* v. *Williams,* 62 Ark. 101, the court said:

> "Was the contract void? Contracts in restraint of trade are either general or partial. Where the contract is unlimited as to space, it is general; where it is *limited as to space,* it is partial, although it may be unlimited as to time. * * * Contracts in partial restraint of trade, if they are reasonable and founded upon a legal consideration will be enforced." (Italics ours.)

The above is in exact accord with the opinion of this Court in *Fowle* v. *Park,* 131 U. S. 88, where contracts limited as to space, but unlimited as to time, were upheld against the plea that they were in unreasonable restraint of trade. The contract in the instant case was not only limited geographically, but was also limited to two existing plants.

In *Warmack* v. *Major Stave Company,* 132 Ark. 173, the Supreme Court of Arkansas said with reference to a contract between a public utility and one of its customers:

> "The principle that the company must supply all

impartially and without discrimination does not prevent it from entering into reasonable arrangements or agreements with its customers growing out of special circumstances."

It is submitted that the contract in question merely laid down reasonable business provisions with respect to the furnishing of gas in the quantities covered by the contract and was not in unreasonable restraint of trade, and that there exists no public policy of the State of Arkansas prohibiting or making illegal such a contract.

Some point is made of the fact that the Harding Glass Company is a very large consumer of gas, but the amount involved is nothing as compared with the amount involved in the case of *Fort Smith Light & Traction Company* v. *Kelley, supra,* or with the total public consumption in the Fort Smith area. But in addition thereto, it is the very fact that the Harding Glass Company is a relatively large individual consumer of gas, which makes the protection afforded by the contract reasonable.

The Twin City Pipe Line Company, as a public utility, is required to use ordinary diligence in providing reasonable facilities and a reasonable supply of gas for its customers, but it is not an insurer of that supply. If one of the manufacturers, using a large quantity of gas, has the right to take its gas, or not, at will, from the utility, as it undoubtedly does in the absence of a contract, then the investment made by the public utility to serve that customer may well be left idle and unproductive at the expense of the utility and the general public served by it. Financial considerations, if nothing else, would prevent the utility from developing or contracting for a supply of gas far in advance of present needs, when its large customers could quit it at will. Respondent's business, according to the undisputed testimony of its president, re-

quires an uninterrupted supply of a large amount of natural gas for a long period of time. In 1925 a few hours interruption in its gas supply resulted in the cooling of molten glass in the process of manufacture to respondent's damage in excess of $50,000—a damage peculiar to the particular business of respondent. (R. 224, 225.) The court determined that this interruption was not due to any negligence of the Twin City Company in the performance of its duty as a public utility (R. 138, 139.) It is apparent, therefore, that the susceptibility of this particular business to extraordinary damages for even partial interruption in its gas supply demanded the making of reasonable arrangements for the furnishing of facilities and gas reserves in excess of those required by the average customer and in excess of those which the Twin City Company was obligated to furnish and provide in the discharge of its duty as a public utility. In the light of these special circumstances the two parties, for a valuable consideration, entered into an agreement, the effect of which was to reasonably insure the furnishing of an adequate gas supply to respondent during the life of the petitioner's gas field, at a rate fixed by public authority. The results of the contract were an expansion of the business of the manufacturer, the construction of additional facilities for delivery of gas to it, and an immediate development of the gas producing territory. Obviously, such results were beneficial both to the public and to the parties. Having secured the benefit of the contract, the manufacturer then decided to take its own gas from its own subsidiaries or from the public utility, as might be most convenient to it, from day to day. (R. 148-151.)

The public policy of Arkansas, as announced by the Supreme Court of that State, does not require that any such flagrant breach of contract shall be tolerated.

The Harding Glass Company cannot well be heard to complain of a contract voluntarily entered into by it, and not the slightest public injury or probability thereof has been made to appear. The State of Arkansas has an anti-trust statute (Chapter 124 Digest of The Statutes of Arkansas, Crawford & Moses, 1921.) That statute should be regarded as fixing the public policy and the law of that state with respect to alleged monopolies. But it is not even contended that the contract in question comes within the prohibition of that statute.

Conclusion.

The evils which courts and legislatures have sought to prevent in prohibiting the enforcement of contracts in restraint of trade were summarized by Chief Justice White in *Standard Oil Co.* v. *United States*, 221 U. S. at 58:

> "* * * it may be with accuracy said that the dread of *enhancement of prices* and of other wrongs which it was thought would flow from the undue limitation on competitive conditions caused by contracts or other acts of individuals or corporations led, as a matter of public policy, to the prohibition or treating as illegal all contracts or acts which were *unreasonably restrictive of competitive conditions*, either from the nature or character of the contract or act, or where the surrounding circumstances were such as to justify the conclusion that they had not been entered into or performed with the legitimate purpose of reasonably forwarding personal interest and developing trade, but, on the contrary, were of such a character as to give rise to the inference or presumption that they had been entered into or done with *the intent to do wrong to the general public and to limit the right of individuals*, thus restraining the free flow of commerce and tending to bring about the evils, such as enhancement of prices, which were considered to be against public policy." (Italics ours.)

It is submitted that the evils set out by Chief Justice White are not present in the contract here involved. The contract cannot enhance the price of gas in Fort Smith because that price is subject to public regulation. The contract was reasonable because the assurance of continued demand was essential to the Twin City Company in view of the peculiar nature of the Glass Company's business and the extent of the utility's investment to serve it. It cannot be said, therefore, that this contract was "unreasonably restrictive of competitive conditions." Nor were there any "surrounding circumstances" which would give rise to any inference that the contract was "entered into—with the intent to do wrong to the general public" or to "limit the right of individuals."

The thought expressed in *Hall Mfg. Co.* v. *Western Steel & Iron Works* (C. C. A. 7th), 227 Fed. 588, 593, that in all cases of this kind there must be balanced against the public interest that is opposed to restrictive covenants that other public interest which demands honesty and fidelity among our business men, finds support in *Baltimore and O. S. R. Co.* v. *Voigt*, 176 U. S. 498, where the following was quoted with approval:

> "It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred, and shall be enforced by courts of justice. Therefore, you have this paramount public policy to consider—that you are not lightly to interfere with this freedom of contract."

This same thought was repeated with emphasis in *Steele* v. *Drummond*, 275 U. S. 199, 205, and in the very

recent case of *Patton* v. *United States*, 281 U. S. 276, 306, it was said:

> "The truth is that the theory of public policy embodies a doctrine of vague and variable quality, and unless deducible in given circumstances from constitutional or statutory provisions, should be accepted as the basis of a judicial determination, if at all, only with the utmost circumspection."

The decree of the court below should be reversed and the decree of the trial court should be affirmed.

Respectfully submitted,

HARRY P. DAILY,
JOHN P. WOODS,
Counsel for Petitioners.

Appendix.

Acts of Arkansas 1921 (General) Act 124, Section 6.

"Section 6. That section 8 of the said Act No. 571 of the General Acts of the General Assembly of the State of Arkansas of 1919, above more particularly referred to, be and the same is hereby amended to read as follows:

"Section 8. Authority to Establish Rates. The commission shall have the power, after reasonable notice and after full and complete hearing, to enforce, originate and establish, modify, change, adjust and promulgate tariffs, rates, joint rates, tolls and schedules for all public service corporations, companies and utilities and all rates and regulations with reference thereto and orders directing the performance of any duties devolving on said company, utility, common carrier or public service corporation under the terms of this act; and whenever the commission shall, after notice and hearing, find any existing rates, tolls, tariffs, joint rates or schedules unjust, unreasonable, insufficient or unjustly discriminatory or otherwise in violation of any of the provisions of law, the commission shall, by an order, fix reasonable rates, joint rates, tariffs, tolls, charges or schedules to be followed in the future in lieu of those found to be unjust, unreasonable, insufficient or unjustly discriminatory, inadequate or otherwise in violation of any of the provisions of this law; provided, however, that nothing herein shall authorize said commission to make any rule, regulation or order whatever to be effective within the limits of any municipality of this State with reference to any tariff, rate, toll, schedule, duty or action of any public service corporation, company or public utility operating within such municipality as a street railroad, telephone company, gas company, pipe line company for transportation of oil, gas or water, electrical company, for the generation or distribution, sale or supply of electricity for heat, light or power, water company or hydro-electric company, it being the intention of this act, hereinafter more particularly expressed, to confer upon the municipal coun-

cils and city commissions of this State, jurisdiction as to such matters, so far as same are effective within the limits of any municipality of this State."

Section 7492, Digest of the Statutes of Arkansas, Crawford & Moses, 1921:

"SEC. 7492. Exclusive privileges. For the purpose of providing water, gas, electric light, heat, cold storage or street railroad, the mayor and council may contract with any person or company to construct and operate such utilities, and may grant to such person or company, for a time which may be agreed upon, the exclusive privilege of using the streets and alleys of such city for such purposes and may authorize such person or company to assign such contract or privileges and transfer such utility to any other person or company having authority to conduct any such business in the city, with full authority to the assignee or transferee to enjoy and use the same in like manner and to the same extent as the assignor could have done; and all such assignments and transfers which have heretofore been made, are hereby ratified and approved. Act March 19, 1925, p. 692."

Section 5448, Digest of the Statutes of Arkansas, Kirby, 1904."

"SEC. 5448. For the purpose of providing water, gas or street railroads, the mayor and council may contract with any person or company to construct and operate the same, and may grant to such person or company for the time which may be agreed upon the exclusive privilege of using the streets and alleys of such city for such purpose or purposes."

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No. 330.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930.

TWIN CITY PIPE LINE COMPANY AND INDUSTRIAL OIL & GAS COMPANY, PETITIONERS,

VS.

HARDING GLASS COMPANY, RESPONDENT.

BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

JOSEPH R. BROWN,
JAMES B. McDONOUGH,
Counsel for Respondent.

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No. 330.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930.

TWIN CITY PIPE LINE COMPANY AND INDUSTRIAL OIL & GAS COMPANY, PETITIONERS,

VS.

HARDING GLASS COMPANY, RESPONDENT.

BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

(This brief would have been much shorter had petitioners not omitted many important facts.)

Courts, in determining whether a given contract is contrary to public policy and void, do not restrict themselves to a partial statement of the facts.

Continental Wall Paper Co. v. *Louis Voight & Sons Co.*, 212 U. S. 227.

Fort Smith Light & Traction Co. v. *Kelley*, 94 Ark. 461.

Wood v. *Kelsey*, 90 Ark. 272.

In the opinion of the Court of Appeals of the Eighth Circuit (R. 253) facts and circumstances, al-

though not at all completely given there, are amply sufficient to show that the clause of the contract on which this suit is based tends to establish a monopoly, and is therefore void as against the public policy of the State of Arkansas.

As petitioners have not printed the contract either in their petition or brief, for the convenience of the court we here set it out in full.

The Contract in Question.

The said contract (R. 12 and 139) is in full as follows:

TWIN CITY PIPE LINE COMPANY, FORT SMITH, ARKANSAS.

In consideration of the undertakings and agreements hereinafter set out to be done and performed by the Twin City Pipe Line Company and Industrial Oil & Gas Company and the Harding Glass Company, it is mutually agreed as follows:

(1) All judgments and decrees now entered for or against either of them, or S. H. Hale, are to be satisfied and cancelled, and all former contracts between S. H. Hale and the Harding Glass Company, and between the Industrial Oil & Gas Company and the Harding Glass Company, and between the Twin City Pipe Line Company and the Harding Glass Company, are hereby abrogated as of September 1, 1926.

(2) All suits and appeals now pending between either of the parties hereto, or S. H. Hale, are to be dismissed and each party thereto is to pay its own

costs, all questions involved in said suits having been adjusted and settled.

(3) The Twin City Pipe Line Company agrees to lay at once an 8 inch pipe line from a connection with its ten inch line at or near what is known as "The Carbarn" to a connection with its 8 inch line on Sixth Street near its regulator station, said 8 inch line to run by the meter station where the gas furnished the Harding Glass Company is measured, and to be connected at said meter station with the lines furnishing the Harding Glass Company with gas.

(4) The Harding Glass Company agrees to take all its requirements of gas for its plants in the City of Ft. Smith, Arkansas, from the Twin City Pipe Line Company so long as the Twin City Pipe Line Company can adequately supply its requirements and to pay for all gas furnished it hereunder, beginning September 1, 1926, at the regular sliding schedule of rates of twelve cents to fifteen cents, which is the rate now in effect for industries in the City of Fort Smith, Arkansas, or at such rate as may hereafter be fixed for industries in the City of Fort Smith by the proper regulatory body or court having jurisdiction. All gas consumed by the Harding Glass Company up to September 1, 1926, shall be paid for at the rate of ten cents per thousand cubic feet.

(5) The Harding Glass Company agrees that in the event there is a shortage of gas so that there is not enough to adequately supply the domestic consumer, that the Twin City Pipe Line Company may discontinue

serving it gas, upon condition that the same character of service be given the Harding Glass Company that is given other industries in the City of Fort Smith, Arkansas, and that his gas service be not discontinued unless that of other like industries is discontinued also.

Witness our hands this 30th day of August, 1926.

Harding Glass Company,
By C. H. Harding,
President.

Industrial Oil & Gas Co.,
By W. R. Martin,
President.

Twin City Pipe Line Co.,
By W. R. Martin,
President.

I consent to the above.
S. H. Hale.

Suggestions as to the Obligations and Substance of Said Contract.

In our opinion, these suggestions are important as tending to show the soundness of the opinion of the Court of Appeals of the Eighth Circuit, but for the sake of brevity we will discuss only those relevant to the three points discussed in the petition and brief of the petitioners.

(1) Said contract was on the letterhead (R. 12) of the Twin City Pipe Line Company, and was prepared by the president of that company (R. 174) and tendered to the respondent for signature.

(2) In the prefatory clause of said contract it is recited that the consideration is "the undertakings and agreements hereinafter set out." If that contention

is sound as we believe, the contract lacks mutuality, and for that reason is unenforceable, there being no obligation upon the petitioners to furnish any gas. If the petitioners had desired an enforceable contract, it does seem that they would have used language plainly obligating them to furnish the gas, especially so since in some jurisdictions it is held (*Wiggins Ferry Co.* v. *Ohio and Mississippi Ry. Co.*, 72 Ill. 360) that, where a contract is in restraint of competition in trade, obligations will not be supplied by implication.

(3) The judgments and decrees referred to were those in suit 448. In that suit there was a judgment in favor of the Twin City Pipe Line Company against the Harding Glass Company for $17,155.46, but that judgment was destroyed by a judgment over in favor of the Harding Glass Company against S. H. Hale and the Industrial Oil & Gas Company, one of the petitioners, for the same sum (R. 108-109). As petitioners had warranted to Hale to save him harmless (R. 128) from the claim of the Harding Glass Company against said Hale on Hale's contract to furnish gas to the respondent (R. 231), said decree therefore, instead of being upon the whole a judgment against the Harding Glass Company, was in truth and in fact a judgment in favor of the Harding Glass Company sustaining its right to ten cent gas until October 30, 1928. Taking the quantity of gas used by the Harding Company (R. 157) as given in the evidence of the petitioners, that judgment in favor of the Harding Company sustaining the Hale contract and the liability of one of the petitioners thereon, was worth to the Harding Glass Com-

pany, being the difference between the city rate of gas and the ten cent rate, the sum of $45,909.81. That sum is easily calculated by taking the quantity of said gas (R. 157) and applying it to the two rates and taking the difference. The satisfaction of the decrees was therefore a detriment to the Harding Company in the sum named.

(4) Appeals had been taken by several of the parties to the Court of Appeals of the Eighth Circuit, taking the whole controversy to that court. The contract provided for the dismissal of all those appeals. Therefore, the considerations for that provision balanced each other.

(5) Upon the undisputed evidence the construction of the eight inch service line imposed upon the Twin City by the third paragraph of the contract, and the only expressed obligation upon the Twin City, cannot in law or equity be a consideration to support the illegal restrictive clause in paragraph (4) binding the Harding Company to take all its requirements without limit of time. In truth the petitioner Twin City Pipe Line Company made a profit by the construction of that service line. Its profit is the difference between the cost of that service pipe line and the saving which it made by getting rid of the decree establishing the ten cent rate. Assuming that said service pipe cost the Twin City $4,489.92 (R. 141), as the Twin City made a profit by abrogating the ten cent gas rate of $45,909.81, its net profit is the difference between the two, which amounts to a clear net profit to the Twin City of $41,419.99.

(6) In paragraph (4) of the contract, the Harding Glass Company agrees to take all its requirements of gas from the Twin City "so long as the Twin City Pipe Line Company can adequately supply its requirements." If the Twin City had wanted to bind itself and its subsidiary, Industrial Oil & Gas Company, to furnish the gas, it would have said so in plain words. In turn it would have acted as did the LaSalle Oil & Gas Company and the Fort Smith Light & Traction Company when Hale entered into a ten year contract with said Light & Traction Company, and would have had the subsidiaries of the petitioners enter into obligations binding them to furnish to the petitioners sufficient gas to fulfill the contract. That situation was known to the petitioners at the time of the making of the contract in question. See answer of Twin City (R. 91) and answer of Fort Smith Light & Traction Company (R. 97). The failure to make such underlying contracts tends to show that the Twin City did not regard said contract as binding it to furnish any gas whatever.

(7) There is absolutely no expressed obligation of the Twin City Pipe Line Company to furnish any gas whatever.

(8) There is no word or sentence in the contract, by implication or otherwise, obligating the Industrial Oil & Gas Company, one of the petitioners, to furnish gas to the respondent or to furnish any gas to the Twin City. Hence the Industrial does not obligate itself to drill wells or to produce or furnish gas. The Twin

City drills no wells (R. 96) and, so far as this record shows, has no power so to do.

(9) The only time limit in said contract is apparently the life of the gas field. Gas was discovered in that community and used in the city of Fort Smith (94 Ark. 461) nearly thirty years before this contract was made. Since larger and better fields of gas have been repeatedly discovered since 1903, this contract therefore, if valid, may last at least a third of a century and probably a century.

(10) Petitioners claim that it was unlawful for the Twin City Pipe Line Company, a public service corporation, to sell gas at any rate other than the city rate; yet this contract expressly agrees that all gas consumed by the respondent up to September 1, 1926, the day after the contract, "shall be paid for at the rate of ten cents per thousand cubic feet." That clause judged by the petitioners' contention in suit 448, as shown in the petitioners' pleadings (R. 76, 77, 78), is absolutely void.

Some Additional Facts.

The Harding Company (R. 210) located its business and plant at Fort Smith largely (R. 217) because of the discovery of a great gas field. The discovery of said gas in so large quantities was in 1916 (R. 155, 168). At that time the petitioner, Twin City, had as its subsidiary the Wildcat Oil & Gas Company. That company, which was a producing company only (R. 168), went out of business in 1919. A court will

judicially know that the discovery of such a large gas field always attracts manufacturers. This one was no exception to the rule and said manufacturers were offered gas at four cents.

Clear Creek Oil & Gas Co. v. *Fort Smith Spelter Co.*, 148 Ark. 260.
Fort Smith Spelter Co. v. *Clear Creek Oil and Gas Co.*, 267 U. S. 231.

The evidence shows (see evidence of A. G. Williams, Jr., General Manager of petitioners, pp. 139, 154, 156, 165, 166, 167, 168, 169, 171, 172) that there were three separate interests participating in the development of the great gas fields of Crawford County. One interest included the Crowe Oil & Gas Company, which was a producing company only, with its subsidiary, the LaSalle Oil and Gas Company, which was a transporting and distributing company; the Clear Creek Oil and Gas Company, which produced, transported and sold; and the petitioners. These three separate interests were active competitors. The LaSalle Oil and Gas Company constructed a pipe line from the gas fields of Crawford County to Van Buren and there connected with the pipe lines of the Fort Smith Light & Traction Company. The latter company, through its subsidiary, owned a small gas field southeast of Fort Smith known as the Massard field. Hence there were at that time four separate interests producing and transporting gas to Fort Smith and its environs. All were actively competing for business in that community. The respondent was probably the largest industrial consumer of gas there, using when

operating from a million to a million and a half cubic feet of gas per day. It had been the customer of the Twin City, without contract of any kind, from the establishment of its plant in 1917 down to the time that it made its contract with S. H. Hale, which was a five year contract.

Prior to 1923 S. H. Hale was not interested in that gas field. Sometime prior to July, 1923, and the date is not given, S. H. Hale acquired all the gas rights, gas fields, transportation lines and property of the Crowe Oil & Gas Company, the LaSalle Oil & Gas Company, and the Clear Creek Oil and Gas Company, thereby coming into the possession of a large supply of gas. About that time or soon after, the field known as the Alma field was developed, which was a great producing field of gas. Hale began an active competition for the furnishing of gas to the consumers of Fort Smith and its environs. In July, 1923, he entered into a ten year contract with the Fort Smith Light and Traction Company (R. 91, 129) to supply it with gas at ten cents and under certain conditions 12.5 cents (R. 131). There is no showing as to whether that gas is still furnished at that figure. That contract was made under the name of LaSalle Oil and Gas Company. That company agreed to sell, and the Fort Smith Light & Traction Company agreed to buy all the requirements of the Fort Smith Light & Traction Company for that period, except a small supply which was then being taken from the Twin City and the Southwestern General Gas Company. Soon after that contract was made, Hale made his contract

with the respondent (R. 31) whereby Hale agreed to sell and the respondent agreed to buy for five years the entire requirements of the respondent at ten cents. By those contracts Hale secured two of the largest consumers, thus successfully competing with the petitioners. The price fixed in the Hale contract with respondent was ten cents, and the same price in the contract with the Fort Smith Light and Traction Company with a provision in the latter contract raising the price to 12½ cents when the quantity exceeded a certain amount (R. 131). Both rates were less than the rate fixed by the city.

Within a week (see district court's opinion, page 127) after that Hale contract was made with respondent the petitioners bought all the gas properties and gas rights (except that known as the Gans field) of S. H. Hale, the LaSalle Oil & Gas Company, the Crowe Oil & Gas Company, and the Clear Creek Oil & Gas Company. That deal made the petitioners the owners and absolute controllers of all gas producing and gas selling and transportation from the Crawford County fields, which were the great fields. That deal left outstanding the gas known as the gas of the LeFlore County Gas & Electric Company, sometimes referred to as the Orr gas (R. 177), and the small Massard field owned by a subsidiary of the Fort Smith Light & Traction Company; and that of the Citizens Gas Company which latter was intended solely for the respondent. In the winter of 1924-25 the respondent, by reason of a shortage of gas furnished to it by the Twin City, suffered a tremendous loss reaching above $50,-

000.00 (R. 217). The respondent contended that loss (R. 87) was due to insufficient service arrangements and that the Twin City discriminated by furnishing sufficient gas pressure to all of their consumers in that neighborhood. See also evidence of Harding (R. 225). Respondent's service pipe was a nine hundred feet, four inch pipe (William's evidence, R. 142). *Respondent offered to pay the expense of installing sufficient service pipes* (R. 87). In the opinion of the district court in refusing the preliminary injunction (R. 124) reference is made to the *four inch* service pipe, and to a previous service pipe (R. 122) which latter had been taken up when respondent notified petitioner that respondent would no longer take gas from petitioner, evidently referring to the time when respondent changed to Hale. In said opinion the district court (R. 125) in substance held that but for the then shortage of gas, relief might have been given to respondent for a better service pipe. But in the final decree the district court dismissed respondent's bill of complaint in suit 448 for want of equity (R. 108).

The evidence shows that to manufacture glass, it is necessary to have a large and continuous supply. The respondent had an investment of nearly a million dollars (R. 218), and, on account of its tremendous loss, it decided it could not remain in Fort Smith unless it should find a supply of gas to prevent a recurrence of said losses. Therefore, in the summer of 1925 persons, who afterwards formed themselves into the Citizens Pipe Line Company (R. 182), and many of whom are in no manner connected with the Harding

Glass Company, began a development which resulted in bringing in a valuable gas field in Oklahoma only a short distance across the river from Fort Smith. That development discovered a field sufficient to furnish the Harding Glass Company with practically all its needed gas. The corporation to develop that field (R. 231) was organized March 26, 1926, before the contract in controversy was signed. The petitioners, in taking over from Hale all his corporations and gas properties, obligated themselves to perform all of Hale's contracts, including his contract with the respondent (R. 128, 129). There is some difference as to the exact date when the petitioners took over the Hale obligations. That difference is immaterial since all admit that said obligations were taken over and were taken over in October, 1923. From that date (R. 127) the Twin City fulfilled the Hale contract and the Hale obligations to furnish gas to the Harding Company *until it acquired the Cazort gas for a longer period* (R. 19, 35, 36, 61, 62, 166).

At the time that petitioners secured all of the available gas in Crawford County, there was what is known as the Cazort gas, but Cazort had no pipe lines (see answer of respondent in suit 448, pages 19, 35, 61). At the time that the deal was made between Hale and the petitioners, the Cazort gas was controlled by a short contract between Cazort, Hale, and the petitioners (R. 166). The petitioners without complaint fulfilled the Hale contract with respondent until they had renewed the contract with Cazort (R. 166). On January 20, 1925 (R. 166) the petitioners secured the

Cazort gas under *an extended contract*, the full extent of it not being given. *Within four days thereafter* (R. 213) the Twin City wrote a very important letter to the Harding Glass Company giving notice (R. 214) that gas would be billed at the city rate. For the first time the Twin City, in that letter, contended that Hale contracted to furnish respondent with gas from one well only. *Hale's contract is not so worded* (R. 31). Said letter (R. 213) claims that it is the intention of the Twin City *"to carry out the contract."* Yet when litigation arose petitioners claimed said contract was void (R. 76, 78, 79). The district court upheld the Hale contract as against petitioner Industrial Oil and Gas Company, and held in effect *that the Harding Glass Company was entitled to gas at ten cents until October 30, 1928* (R. 138, 108). The Harding Company refused to pay the increased rate demanded and the Twin City thereupon brought suit to recover the difference between the two rates. That suit resulted in the decrees referred to in suit 448, being a decree upholding respondent's right to ten cent gas to October 30, 1928, which right was worth to the respondent $45,909.81 as heretofore shown.

Before this suit was tried, the petitioners, evidently fearing competition from S. H. Hale with his Gans gas, secured the Gans gas. Some one had already secured a franchise in Fort Smith under the name of the Border Gas Company (R. 187), and it was alleged in the answer of the Citizens Pipe Line Company (R. 193) that that franchise had been secured or purchased by the same parties who control the petitioners and

that the acquisition of said Border Gas Company was to enable the persons who control the Twin City to obtain a complete monopoly of all gas in and about Fort Smith. Since the Gans gas field was owned by Hale, and in view of what Williams says about persons interested with petitioners securing the Gans gas (R. 170), it is believed that the Border Gas Company was a Hale concern.

The petitioners' evidence shows that that gas was obtained in a contract between S. H. Hale individually and Thompson Ross individually (R. 170, 174). The petitioners did not produce the contract and the court sustained their refusal (R. 171). Also before this suit was tried, the same interests which now control the petitioners secured all the gas properties of the Fort Smith Light & Traction Company and organized the Fort Smith Gas Company for that purpose (R. 177). Therefore, at the trial of this case, all gas fields near Fort Smith were secured and owned by the petitioners and their allied interests, except that owned by the Citizens Gas Company and the Citizens Pipe Line Company and the gas at Poteau, in the State of Oklahoma, some twenty-eight miles from Fort Smith.

ARGUMENT.

The respondent contends that there is no sound ground upon which the petition may be granted.

POINT ONE.

The decision of the court below is not in conflict with the decisions of other circuit courts of appeal on the same matter.

It is respondent's contention that that portion of the contract which obligates the respondent to take all its requirements from the Twin City, which is the clause on which this suit is based, is void as against public policy of the State of Arkansas.

This court will not grant writs of certiorari to change the public policy of a state, nor to harmonize conflicts in the public policy of the different states.

In a well prepared opinion, the late Judge Trieber, district judge of the Eastern District of Arkansas, in the case of *Logan & Byran* v. *Postal Telegraph Company*, 157 Fed. 570, quoting from the syllabus, said:

> "Courts will refuse to enforce a contract, although lawful and enforceable in the courts of the nation where it is entered into and is to be performed, if it is against the public policy of the state in which it is sought to enforce it."

In *Howcott* v. *Kilburn*, 44 Ark. 213, the court held that the validity of a contract must be determined by the law of the place where made. Hence the Court of Appeals, (39 Fed. (2d) 409) in this case, well said:

> "The public policy to be ascertained is the public policy of Arkansas."

This court has repeatedly held that the public policy of a state is a matter within the exclusive power and jurisdiction of the state itself.

Northwestern Mutual Life Insurance Co. v. *Johnson*, 254 U. S. 96.

Whitfield v. *Aetna Life Insurance Co.*, 205 U. S. 489.

The decision in the tenth circuit is not in conflict.

Petitioners rely upon the case of *Griffin, et al.* v. *Oklahoma Natural Gas Corporation*, 37 Fed. (2d) 545. In that case the City of Iola, Kansas, agreed to buy its supply of gas from the J. B. Kirk Gas & Smelting Company, which company was not a public utility. The City made two contracts, both with the same company, which will be called the Kirk Company. In the first contract, the Kirk Company agreed to sell and deliver to the City of Iola, and the City of Iola agreed to buy, all natural gas required by the City for fuel in the operation of the City's electric light and water works plant. The City also agreed to buy gas for fuel for its power plant. In the second contract, the Kirk Company agreed to sell and deliver to the City of Iola, and the City agreed to purchase natural gas for resale to the inhabitants of the City for domestic and other uses. The contract was assigned by the Kirk Company to the Oklahoma Natural Gas Corporation. That company, relying upon the validity of the contract, expended the sum of $310,000.00 in improvements, improving the gas supply and the transportation facilities. After that expenditure by said corporation, the City of Iola

entered into a contract with Griffin, whereby Griffin agreed to furnish gas to the City of Iola for a certain period.

Thereupon the Oklahoma Natural Gas Corporation brought the suit to enjoin the City of Iola and Griffin from a breach of the contract. Among other contentions, the City and Griffin asserted that the contracts were void because in restraint of trade. They did not contend that the contracts were void because against public policy. The case was not that of an exclusive contract between a public utility and a customer. *The City itself was the only customer of the Oklahoma Gas Corporation at Iola.* It was a contract to supply to the City gas to enable the City to furnish to the public, power, heat and light. It was therefore a contract *in the interest of the public* and was in no manner inimical to the public. The City of Iola did not contend that the contract was void because it injured the public.

If the Griffin case has the meaning given it by counsel for the petitioners, then said Griffin case is plainly in conflict with the public policy of the State of Kansas as shown by its decisions and statutes. This is shown by the decision of the Supreme Court of Kansas in the case of *The Keene Syndicate* v. *The Wichita Gas, Electric Light and Power Company,* 69 Kans. 284, a case decided long before the Griffin case. In that Kansas case, a corporation engaged in the business of generating and furnishing electricity for public and private use, leased to a rival corporation in the City for a period of ten years machinery

and appliances used in generating electricity, obligating itself not to engage in the business of furnishing electric light and power to the public during that period. In holding said contract invalid, the Kansas court used this language:

> "The inquiry should be whether the agreement, which, in its necessary or contemplated operation upon the actions of the party to it, *tends* to restrain their natural rivalry and competition, and thus to result in the disadvantage of the public or of third parties, is against the principles of sound public policy, and consequently void."

Said court cited the case of *Western Wooden-ware Ass'n* v. *Starkey,* 84 Mich. 76, and also *Gibbs* v. *Consolidated Gas Company,* 130 U. S. 396.

Besides, the Court of Appeals of the Eighth Circuit, in a case arising in Kansas, pointed out clearly the difference between such contracts as that in the Griffin case and contracts which are void as against the public policy of Kansas. We refer to the case of *Hutchinson Gas & Fuel Company* v. *Wichita Natural Gas Company,* (8th Cir.) 267 Fed. 35. The contract involved in that suit as it was originally written was void because against the public policy of Kansas. As originally written that contract, because of its exclusiveness, tended to establish a monopoly. However, before the contract came into the courts, the parties to the contract changed the same so as to remove the exclusive void feature thereof. The Hutchinson Company, under the original contract, was given the exclusive agency to dispose of the gas furnished by the Wichita Company. In the contract as changed,

the right was given so that other companies might be created agents to sell the gas, thereby removing the objectionable feature. Evidently that was done in order to make the contract valid. That suit was brought by the Hutchinson Company, a distributing company, to enjoin the Wichita Company, a natural gas producing company, from raising its rate for the sale of its gas and from ceasing to supply the gas at a rate specified in the contract. The lower court refused to enforce the contract by injunction and the bill of complaint was dismissed. The decree of the lower court was affirmed.

The decision in the Fifth Circuit does not conflict with the decision of the Court of Appeals of the Eighth Circuit.

The same reasoning, which is above applied to the Griffin case, is applicable to the case of *Montgomery Traction Company* v. *Montgomery Light & Water Power Company,* 229 Fed. 672. That case first appears under the style of *Montgomery Light & Power Company* v. *Montgomery Traction Company,* 191 Fed. 657. The opinion in the case was given in the overruling of a demurrer to the bill of complaint. The Power Company, engaged in the business of generating and supplying electrical current for light and power, made a contract with the Traction Company, a company engaged in the street car business, whereby the Power Company agreed to sell and deliver, and the Traction Company agreed to purchase and receive electrical current for a period of fifteen years. At the time that the suit was brought, eight years

of the limited time in the contract had expired. The electricity was to be used by the Traction Company for propelling its cars and the cars of other corporations that might operate over the tracks of the Traction Company. Immediately upon the making of the contract, the Power Company expended $200,000.00 in machinery and apparatus to enable it to carry out the terms of the contract. The chief question considered and decided by the court in that case was whether the contract was capable of specific performance and injunctive relief.

The said case next appeared under the title of *Montgomery Light & Water Power Company* v. *Montgomery Traction Company,* 219 Fed. 963. That too was a decision in the district court and the opinion was upon the final hearing by a different judge from the former decision. In that opinion the court did discuss the question of whether or not the contract was against public policy and held that it was not. The court evidently had in mind (although it is not so stated) the public policy of the State of Alabama as the case arose and was tried in that state. In commenting upon the influence of public policy upon the validity of a contract, the court (page 969) expressly stated in substance that no court would lend its aid to the enforcement of an executory contract which was against public policy. Said court, citing *Thomas* v. *Railroad Company,* 101 U. S. 71, concluded that public policy forbade a corporation from making a contract which rendered it incapable of performing its duties to the public. It will therefore be observed that that

court held that that contract was not against public policy for the reason that it did not interfere with the discharge of a duty by the Traction Company to the public. On the other hand, the contract aided the Traction Company to discharge its duty to the public, and was therefore not against the interest of the public. In discussing the subject, the said court used this language:

> "On the contrary it is evident that such contract merely provided a means by which respondent was to perform the duty imposed upon it by its charter and the discharge of which it owed the public."

The ground of that decision was, therefore, that said contract was a benefit to the public and not an injury.

The said Montgomery case next appeared in the Court of Appeals of the Fifth Circuit under the title of *Montgomery Traction Company* v. *Montgomery Light & Water Power Company*, 229 Fed. 672. We do not find in the opinion any discussion of the alleged invalidity of that contract because in conflict with the public policy of Alabama. That court discussed (1) the power of a foreign corporation to make a contract under Alabama law; (2) whether that contract contained the mutuality entitling the Power Company to specific performance; and (3) that the contract could and should be specifically performed. It is therefore confidently submitted that said Montgomery case did not present the question of the invalidity of a contract whose tendency is to stifle competition and that subject was not discussed in any

one of those opinions. Judge Clayton was the only one of the judges who referred to the subject of public policy and his discussion related to that public policy which prohibits a corporation from entering into a contract which will disable it from discharging a public duty. The question here presented was not, therefore, presented there, nor discussed, nor decided.

If said Montgomery case has the meaning given it by learned counsel for the petitioners, then said decision is erroneous and in conflict with the decisions of the Supreme Court of Alabama on the subject under consideration. The Supreme Court of Alabama has repeatedly held that contracts against public policy are void and unenforceable. The following Alabama cases support the well established rule that contracts such as the one in controversy tend to establish a monopoly, and hence against public interest and public policy and are void:

American Laundry Co. v. *E. & W. Dry Cleaning Co.*, (Ala.) 74 So. 58.

Arnold v. *Jones Cotton Co.*, 152 Ala. 501.

Tuscaloosa Ice Mfg. Co. v. *Williams*, 127 Ala. 110.

Georgia Fruit Exchange v. *Turnipseed*, 9 Ala. App. 123.

We therefore respectfully submit that there is no conflict between this case and the cases of the Fifth and Tenth Circuits, and that if said cases are in conflict, then said cases are unsound because in that event they are contrary to the decisions of the Supreme Courts of Alabama and Kansas.

The decisions in the other circuit courts of appeal are in line with the decision of the Eighth Circuit on the question involved.

Without comment, we refer to the following cases:

Oceanic Steam Nav. Co. v. *Corcoran* (2d Cir.), 9 Fed. (2d) 724.

Hubbard Ayer Inc. v. *Federal Transportation Co.* (2d Cir.), 15 Fed. (2d) 274.

Continental Candy Corp. v. *California & Hawaiian Sugar Refining Co.* (D. C. Calif.), 270 Fed. 302.

Davis v. *Jointless Fire Brick Co.* (9th Cir.), 300 Fed. 1.

Sampliner v. *Motion Picture Patent Co.* (2d Cir.), 255 Fed. 242.

B. V. D. Co. v. *Isaac* (6th Cir.), 257 Fed. 709.

Davis v. *Southern Pacific Co.* (D. C. Calif.), 235 Fed. 731.

Waltham Watch Co. v. *Keene*, 209 Fed. 1007.

Western Union Telegraph Co. v. *Postal Telegraph Co.* (9th Cir.), 217 Fed. 533.

Fox Solid Pressed Steel Co. v. *Schoen Mfg. Co.* (3d Cir.), 84 Fed. 544.

Kellog Toasted Corn Flake Co. v. *Buck* (D. C. Calif.), 208 Fed. 383.

Whitridge v. *Mt. Vernon Woodberry Cotton Duck Co.* (D. C.), 210 Fed. 302.

Logan & Bryan Co. v. *Postal Telegraph Co.* (D. C.), 157 Fed. 570.

Bailey & Graham v. *Phillips* (5th Cir.), 159 Fed. 535.

C. M. & St. Paul Ry. Co. v. *Wabash* (8th Cir.), 61 Fed. 993.

We will also cite under Point Three from the state courts of California, Pennsylvania and New York, showing that the rule in those jurisdictions is the same as that decided by the court below.

In the case of *Tuscaloosa Ice Manufacurting Company* v. *Williams*, 127 Ala. 110, the court used this applicable language in speaking of the contract:

> "It tends to injure the public by stifling competition and creating a monopoly. Its manifest purpose, even upon its face, and certainly when taken in connection with the facts averred in the plea, was to secure to the covenantee a monopoly in the production and sale of ice in the town of Tuscaloosa and vicinity, and such is its operation and effect."

See 13 Corpus Juris, pages 478 and 481, and the innumerable cases there cited along the same line.

The Griffin, the Montgomery, and the Fort Smith Light & Traction Company cases (94 Ark. 461), which latter case will be discussed under Point Three, belong to a different class of cases from the instant case. The contracts in those cases are illustrated by the decision of the Supreme Court of Texas in the case of *Lone Star Gas Company* v. *Municipal Gas Company*, 3 S. W. (2d) 790, a case cited in the petitioners' brief at page 11. The theory upon which the contracts in that class of cases are sustained is that *they are in the interest and in the aid of the public.* They do not conflict with the public interest. They do not establish a monopoly. They aid a public service corporation, when such corporation is involved, in the discharge of its duty. In the Griffin case, a case referred to in petitioners' brief as involving a public service corporation, the furnisher of gas was not a public service corporation.

Consideration of the Contract.

Under Point One, and on page 6 of their brief, petitioners discuss the consideration. As we understand

their argument, it is that a valuable consideration supports the contract. In such case the consideration is immaterial. The rule is universal that a good consideration will not support a contract void as against public policy.

6 R. C. L., Section 14, page 707, and cases.
6 R. C. L., Section 204, page 803, and cases.
6 R. C. L., Section 214, page 814, and cases.
13 Corpus Juris, pp. 478 to 481, and cases.

Besides, the undisputed evidence shows that the petitioners made a net profit resulting from the contract, after paying itself for the expense of putting in the service pipe, the sum of $41,419.99. In addition, it is argued, as we understand the brief, that the service pipe was solely for the benefit of the respondent. The petitioners' evidence, as we construe it, is to the contrary. The General Manager of the petitioners did say (R. 156) that the said service pipe was of no use to the petitioners, except to serve the respondent. Said witness, however, immediately thereafter (R. 177, 179, 180) testified to facts which showed positively that said service connecting pipe was of service to the gas system. Said witness testified that, by reason of improvements in the highway, and by reason of washouts on the river front, and by reason of tramps setting fire to the gas near the river, customers on the two lines were occasionally out of gas. At one time the ten inch line was out of use for three weeks. By looking at the petitioners' map on page 146, it will be seen that the eight inch connection, which passed by the respondent's plant, when the ten inch line had

broken down at the river, would enable petitioners' customers to be served through the other line. When the eight inch line would break down the customers on that line could be served through this other (R. 156, 178, 180). It was claimed by said witness that the river caused one of the damages, public improvements caused the others, and tramps caused the third. The river will always be there as a menace, public improvements will always be made, and tramps will ever be present. Hence this service pipe is of use to the gas system and the General Manager of the petitioners so admitted on page 179. By its use the petitioners could supplement the gas pressure either way (R. 156, 179, 180).

Again it is argued (Petitioners' Brief page 7) that it was necessary for the respondent to have assured a gas supply during the life of the field. Counsel claim that the evidence of respondent's president "makes plain that a contract for a shorter period of time * * * would have been of no value to it." Clearly said counsel misunderstand the meaning of the evidence of C. H. Harding (See R. 216, 217, 218).

We therefore respectfully submit that, upon the contract itself and all the facts, said contract plainly tended to a monopoly. Said contract therefore tended to establish a monopoly and prevent other gas producers from entering that field. In addition to the other cases elsewhere cited, the following authorities support the contention that the instant contract tends to create a monopoly.

Shapard v. Lesser, 127 Ark. 59.
Pond on Public Utilities, Sections 205, 207.

6 R. C. L., Section 204, page 803, and cases.
Central New York T. & T. Co. v. *Averill*, 199 N. Y. 128.
Chicago Gas Light Company v. *People's Gas Light Co.*, 121 Ill. 530.

See also the Arkansas cases cited below under Point Three.

In the case of *United States* v. *Addyston Pipe & Steel Company*, 85 Fed. 271 (afterwards considered by this court in 175 U. S. 211), Judge Taft, then circuit judge, said:

> "But the sole object is to restrain trade in order to avoid the competition, *which has always been* the policy of the common law to foster" (italics ours).

Partial Restraint of Trade Will Not Be Tolerated in a Contract Between a Public Service Corporation and Its Customers.

This is a subsidiary question to the one above discussed, but in our opinion, necessarily has its place in determining whether petitioners are entitled to the writ of certiorari in the instant case. A full discussion is essential because petitioners (Brief pp. 6 to 9) give it great importance. In our opinion, the learned district court in this cause reached an erroneous result in part because of his misunderstanding the application of this doctrine to the instant case. The said court used this language:

> "I do not think that the contract was in restraint of trade. If, however, it could be said to have had such an effect, it was only a partial restraint of trade."

From that language we are impressed with the view that said learned court was of the opinion that partial restraint of trade did not invalidate a contract when said contract was between a public service company and a customer. The common law of England was adopted by the State of Arkansas and is in force in that state.

Crawford & Moses' Digest, Section 1432.
Horsley v. *Hilburn,* 44 Ark. 458.
Hardage v. *Stroope,* 58 Ark. 303.

See the Arkansas Constitution, decisions and statutes cited under Point Three below.

In *Gibbs* v. *Consolidated Gas Company,* 130 U. S. 396, this court said:

> "* * * innumerable cases, however, might be cited to sustain the proposition that combinations among those engaged in business impressed with a public or *quasi* public character, which are manifestly prejudicial to the public interest, cannot be upheld."

It was the rule at common law, and the rule in Arkansas under the common law, and we believe the rule everywhere, that a contract between a public utility and a customer, though only in partial restraint of trade, is yet absolutely void, because the public interest will not tolerate any kind of restraint in that respect by a public utility.

In 6 R. C. L., Section 204, page 803, the rule is thus declared:

> "The ordinary rule that contracts in partial or reasonable restraint of trade are not invalid, does not apply to corporations engaged in a public busi-

> ness. In fact it may be said that if there is any sort of business which from its peculiar character can be restrained to no extent whatever without prejudice to the public interest, the courts would be compelled to hold void any contract imposing any restraint, however partial, on this peculiar business, provided, of course, it is shown clearly that the peculiar business thus attempted to be restrained is of such a character that any restraint upon it, however partial, must be regarded by the court as prejudicial to the public interest."

Many cases are cited in support of that doctrine, some of which are cited by the Court of Appeals of the Eighth Circuit in its opinion in this case (R. 256, 257, 258).

We think that rule is established by this court in the case of *Gibbs* v. *Consolidated Gas Company,* 130 U. S. 396. In that case, this court in substance stated that if the contract was forbidden by public policy, it was void. In the body of the opinion, this court, through Mr. Chief Justice Fuller, used this language:

> "Hence, while it is justly urged that those rules which say that a given contract is against public policy, should not be arbitrarily extended so as to interfere with the freedom of contract (*Printing Co.* v. *Sampson,* L. R. 19 Eq. 462), yet, in the instance of business of such character that it presumably cannot be restrained to any extent whatever without prejudice to the public interest, courts decline to enforce or sustain contracts imposing such restraint, however partial, because in contravention of public policy."

In support of that, this court cited in said opinion many authorities and we deem it unnecessary to review them here.

As to the public nature of the gas business, this court, in the Gibbs case, said:

> "The supplying of illuminating gas is a business of a public nature to meet a public necessity; and where such business cannot be restrained without prejudice to the public interest, contracts imposing such restraints, however partial, will not be enforced or sustained, because in contravention of public policy."

In Wyman on Public Service Corporations, Section 685, this language appears:

> "It is therefore idle for a *public service company* to attempt to ward off competition by entering into exclusive contracts for terms of years."

The same author, at Section 691, points out the very difference which the learned district court failed to recognize. It is there said:

> "It is a safe principle to go by that no arrangement will be enforced by the courts whereby public service is hampered, even if such arrangements are generally supported where private business is involved."

See: *W. Va. Transport Co.* v. *Ohio River Pipe Line Co.*, 22 W. Va. 600.

We cite the following cases on the same point without comment:

Gwynn v. *Telephone Co.*, 69 So. C. 434; 48 S. E. 460.

Salt Co v. *Guthrie*, 35 Ohio St. 672.

Pond on Public Utilities, Sections 205, 207 and cases cited.

Central New York T. & T. Co. v. *Averill*, 199 N. Y. 128.

Amarillo Oil Co. v. *Ranch Creek Gas Co.*, (Texas), 271 S. W. 145.

Love v. *Kozy Theatre Co.*, 193 Ky. 336.

It is the tendency of the contract which makes it void as against public policy.

Reeves v. *Decorah Farmers' Cooperative Society*, 160 Iowa 194.
W. W. Montague & Co. v. *Lowry*, 193 U. S. 38.
Anderson v. *Jett*, 89 Ky. 375.
Chapin v. *Brown Bros.*, 83 Iowa 156.
Boutwell v. *Marr*, 71 Vt. 1.
13 Corpus Juris, page 480, Section 423.
Barrows v. *McMurtry Mfg. Co.*, 54 Colo. 432.
Anderson v. *Shawnee Compress Co.*, 17 Okla. 231.
19 R. C. L. 36.

In Joyce on Monopolies, Section 92, page 119, the author says:

> "The rule that agreements in general restraint of trade are void while those in partial restraint when reasonable and founded upon a valid consideration are valid is declared to be not applicable to corporations engaged in a public business."

See also page 120, same book.
Union Trust Co. v. *Kinloch T. Co.*, 258 Ill. 202.

In *Sampliner* v. *Motion Picture Patent Co.*, 255 Fed. 242, the court said:

> "The question of whether a contract is void as contrary to public policy is determined by its general tendency, and if that is opposed to the interests of the public, the contract is void, even though in the particular case the intent of the parties may have been good, and no injury to the public may have resulted."

As long as the petitioners can maintain the complete monopoly which they now have, there will be no incentive to develop gas fields and increase the business

of the community and recover the natural gas, which is a great asset to that community.

This court, in the case of *Weil* v. *Neary*, 278 U. S. 160, said:

> "An agreement against public policy is void even though the intent was good and no injury resulted."

POINT TWO.

The decision of the Court of Appeals is not untenable; neither is it in conflict with the weight of authority.

The authorities from which we have quoted, and which we have discussed and cited above, are applicable here and, in our opinion, answer every contention of the petitioners made under Point Two. "Requirements" contracts cannot disregard public policy. There is nothing in the law that gives such contracts any validity or sacredness over other contracts. A contract which violates public policy cannot be validated by calling it a "requirements" contract. Such a ruling would make monopoly supreme. Competition would be smothered and destroyed under the cloak of requirements. Such a rule would validate every such contract although it created a monopoly. Such ruling would therefore repeal Section 19 of Article 2 of the Constitution of Arkansas. Such an argument overlooks the real ground upon which contracts like those in the Griffin, Montgomery, and Fort Smith Light & Traction Company (94 Ark. 461) cases are upheld. Such contracts as appear in those cases are contracts in aid of and for the benefit of the public interest.

The solid ground on which such contracts may logically rest is pointed out by this court in *Chicago, etc., Railroad Co.* v. *Pullman Southern Car Co.*, 139 U. S. 79. That contract obligated the Pullman Company to furnish to the Railroad Company all the requirements of the latter company as to pullman service. That contract was therefore as much a "requirements" contract as any of those cited by the petitioners. In that case, this court in substance held that the contract there involved, although exclusive for fifteen years, aided the Railroad Company to serve the public, and hence was not invalid, saying:

> "It thus used the instrumentality of another corporation in order that it might properly discharge its duty to the public."

In that case this court also pointed out the difference between contracts of that kind and contracts that are injurious to the public and void because in conflict with the public interest.

The Court of Appeals of the Eighth Circuit did not hold this contract invalid because it was a "requirements" contract. It was held invalid because it tended to establish a monopoly and was, therefore, against the public policy of the State of Arkansas. A "requirements" contract may be valid or invalid. We do not contend that the contract in controversy is invalid because it is a requirements contract. There may be, and is, a grave question as to whether paragraph (4) of said contract (R. 139) contemplates the furnishing of only such gas as the Twin City may will or wish to furnish. If that is its meaning, said con-

tract would fall by reason of the absence of a binding obligation against the Twin City to furnish gas. An agreement to furnish such gas as the Twin City may will or wish to furnish would impose a similar obligation upon the respondent to use such gas as the respondent might will or wish. Such a contract would therefore be unenforceable, for the reason that the quantity of gas is what either party might will or wish to buy or sell.

Hutchinson Gas & Fuel Co. v. *Wichita Natural Gas Co.*, (8th Cir.), 267 Fed. 35.
Cold Blast Transportation Co. v. *Kansas City Bolt & Nut Co.*, (8th Cir.), 114 Fed. 77.
Wells v. *Alexandre*, 130 N. Y. 642.
Woerheide v. *Barber Asphalt Paving Co.*, 251 Fed. 196.
Northern Iowa Gas & Electric Co. v. *Town of Luverne*, 257 Fed. 818.
Continental Petroleum Co. v. *Ocean Oil Co.*, 262 Fed. 278.

We do not, however, rely upon that proposition.

On pages 10 and 11 of petitioners' brief is cited a "wilderness" of cases, claiming said cases support the validity of "requirements" contracts. We have carefully examined every single case there cited. Not a single case there cited discusses the principle upheld by the Court of Appeals on which this case turns. It would make this brief too long to review those cases in detail.

However, in one of those cases (*Lone Star Gas Co.* v. *Municipal Gas Co* (Tex. Sup. Ct.), 3 S. W. (2d) 790) the principles are pointed out which distinguish those "requirements" contracts from the contract un-

der consideration. In that case the Texas Supreme Court did hold invalid a forfeiture clause in a contract between a gas producing company and a gas distributing company, for the reason that said forfeiture clause was in violation of public policy and tended to disable a corporation from discharging its public duty. Said court in effect held that the producing company, through the distributing company, was serving the consumers in the localities and towns. On that subject the Texas court said:

> "The Lone Star Gas Company undertook to serve the consumers of these various localities through the instrumentalities of the Municipal Gas Company. The Municipal Gas Company undertook to serve the consumers of these various localities through the instrumentalities of the Lone Star Gas Company. Neither can make use of a forfeiture or penalty clause of their contracts to defeat or avoid their duties to perform these public services."

On the same subject, the court further said:

> "Plaintiff in error's relation to these contracts, and through them to the consumers, together with its pipe line systems and defendant in error's distributing systems, fixes its public duties and obligations in the premises, and makes active and applicable the principle of public policy that, as a penalty, this right of forfeiture clause in the contracts cannot be invoked, but is unenforceable and void."

The Texas Court then quoted from the opinion of Chief Justice Fuller in the case of *Gibbs* v. *Consolidated Gas Company,* 130 U. S. 396.

The forfeiture clause in that case was therefore held invalid, *not because it was a requirements con-*

tract, but *because it violated public policy.* The court held that the remainder of the contract was in aid of the public interest and valid.

In further argument on Point Two as to "requirements" contracts, it is urged (Petitioners' Brief p. 12) that a contract of this kind is valid because it is necessary that the seller of natural gas, as a matter of sound business, should increase its investment in order to meet the requirements of an abnormally large industrial user. The plain meaning of that argument is that the seller of natural gas should have a right to make restrictive contracts and *establish a monopoly* in order to protect his investment. Such an argument means that the producer and seller of natural gas needs and must have a monopoly in order to earn a fair return. It means that Section 19 of Article 2 of the Constitution of Arkansas is invalid because it declares that a monopoly shall not be allowed.

See the case of *Cap F. Bourland Ice Co.* v. *Franklin Utilities Co.*, 180 Ark. 770 discussed below.

That argument is further emphasized by said counsel by urging that such a contract prevents the customer from being left free to abandon at any time the use of such gas. *Such an argument is plainly an admission that the contract creates a monopoly.* Similar reasoning is presented several times throughout petitioners' brief. Along the same line it is argued that the right of a customer to select at will his own gas producer and furnisher leads to business disaster. In other words, it is thus argued that the public policy condemning moropoly is wrong. We have found no decisions anywhere to support such reasoning.

Along the same line (brief p. 13) it is urged that a requirements contract between a public utility and a large industrial user "is far less susceptible to attack for illegality based upon monopolistic tendencies than similar contracts of purely private corporations where, as in the case at bar, the rates and service of the public utility are regulated by public authority." That argument confuses the principles applying to contracts covering the sale of a business or a profession with the class of contracts under consideration. Under the Constitution and laws of Arkansas, as we will show under Point Three, a contract "of purely private corporations," if contrary to the public policy of the realm, is invalid.

Along the same line it is urged that such a contract, although tending to establish a monopoly, will not be successful as such for the reason that public authority controls the price. *The control of the price is only one of the evils of a monopoly.* It is an interesting thing in the history of this gas development that, when competition was sharp and active, the price of gas was four cents. As the field became monopolized, it gradually increased until it is now at the rate of fifteen cents for industrial gas and about thirty cents for domestic gas. Besides, the Act of Arkansas referred to (Acts of Arkansas 1921, p. 199) shows that the public authority is only one of the powers that may fix a gas rate. The gas producing and gas distributing company is another important factor in the fixing of gas rates. The gas company has the power to cut down the supply. It may fail to make develop-

ment. It may take many other steps tending to make gas scarce, so that the community will be willing to have the public authority increase the price.

After making the above argument, counsel (brief p. 13) criticize the case of *Coombs* v. *Burk*, 40 Cal. App. 8; s. c. 180 Pac. 59. We respectfully submit that the argument against the sound principles of that case are likewise unsound. Said case was cited with approval by the California court in the case of *Fidelity Credit Assur. Co.* v. *Cosby*, 90 Cal. App. 25; s. c. 265 Pac. 372. Said case of *Coombs* v. *Burk* has also been cited in such textbooks as Elliott on Contracts and Williston on Contracts.

Elliott on Contracts and new Supplement, Section 817.

In note 24, the author says:

"A contract by which a gas company agrees to install for a consumer certain appliances in consideration of the latter's agreement to purchase all gas used from the company or pay a certain sum is void," citing the case of *Coombs* v. *Burk*.

The author in Section 817 cites the following cases:

Arnold v. *Jones Cotton Co.*, (Ala.) 12 L. R. A. (N. S.) 150, and note.
Chicago, I. & L. Ry. Co. v. *Southern Ind. Ry. Co.*, (Ind.) 70 N. E. 843.

In Williston on Contracts, Section 1645, the author states:

"A contract to sell within a certain territory goods of a specified kind to or through the agency of one person only generally is valid; but it is otherwise if such a contract is part of a

scheme whereby it is sought to establish a monopoly; or if freedom of dealing with a public service company is impaired, it will not be enforced," citing *Coombs* v. *Burk*.

The cases heretofore cited, as well as Section 1645 of Williston on Contracts, show the difference between the two classes of contracts. As the court below well reasoned, such contracts tending to establish a monopoly are void because against public policy and in restraint of trade.

In support of the principles declared by the California court in said case of *Coombs* v. *Burk*, it is believed that a number of cases from the Supreme Court of California sustain the rule announced by the Court of Appeals in the instant case. Without comment we refer the court to the following:

Santa Clara Valley Mill & Lumber Co. v. *Hayes*, 76 Calif. 387.

Shasta County v. *Moody*, (Calif.), 265 Pac. 1032.

We have already cited cases from the Ninth Circuit along the same line.

Petitioners under Point Two argue that the instant contract is only in partial restraint of trade. In making that argument, petitioners overlook the law which declares that no restraint of any kind will be tolerated in the contract of a public utility. We have argued that question fully under Point One above. It is decided by this court in our favor in *Gibbs* v. *Consolidated Gas Company*. See the many other authorities and cases cited in this brief above pages .... to .....

POINT THREE.

The decision of the Court of Appeals is not in conflict with the applicable local decisions on an important question of local law. On the other hand, the Constitution and decisions of Arkansas are in line with the opinion of the Court of Appeals.

Under this head petitioners have discussed the public policy of the State of Arkansas. We will first refer to the Constitution, laws and decisions of that state, and then briefly notice the cases cited by petitioners.

Arkansas Constitution, Laws and Decisions Showing that the Contract in Controversy is Void as Against Public Policy.

Section 19, Article 2, of said Constitution reads:

> "Perpetuities and monopolies are contrary to the genius of a republic, and shall not be allowed."

By Section 2 of the same article, the right to acquire and possess property is recognized and guaranteed. By Section 3 of the same article, the declaration is made that no citizen shall be deprived of any right, privilege or immunity. By Section 18 of the same article, the General Assembly of Arkansas is prohibited from making any grant to any citizen or class of citizens of privileges or immunities which upon the same terms shall not belong equally to all citizens. By Section 29 of the same article, the declaration is made "that everything in this article is excepted out of the general powers of the government, and shall forever remain inviolate; and that all laws

contrary thereto, or to the other provisions herein contained, shall be void."

The above sections of the Constitution of Arkansas plainly condemn any contract tending to establish a monopoly. The legislature of Arkansas is without power to pass any law the effect of which would be to establish a monopoly in violation of the above sections of the Constitution of Arkansas. It was so held in the very recent case of *Cap F. Bourland Ice Co.* v. *Franklin Utilities Co.*, 180 Ark. 770, a case cited by petitioners on page 17 of their brief, for another purpose however. In that case similar arguments to those made by petitioners, were advanced to sustain the validity of Sections 15, 16 and 17 of Act 55 of the General Assembly of Arkansas of 1929. For said Act, see Acts 1929, page 110.

In the case at bar, as we understand the argument of counsel for petitioners, as the same appears on pages 12, 13, 16 and 18 of their brief, the contention is made that the public utility should have the right to make an exclusive contract to protect its investment and to prevent a large customer from abandoning the service at any time. That was the same class of arguments advanced in the above case to sustain Sections 15, 16 and 17, which sections authorized the Arkansas Railroad Commission upon a hearing to forbid the establishment of a new ice plant in any municipality or community. It was urged that such a rule would prevent useless investments in such businesses and would protect both the public and the company furnishing the ice, and such action would

prevent the duplication of unnecessary plants, facilities and service and afford the public prompt and continuous service at just and reasonable rates.

After referring to the sections of the Arkansas Constitution above named, the Arkansas court held that Sections 15, 16 and 17 of said Act, *which in effect established a monopoly* of the ice business, were unconstitutional and void. That case was not published at the time of the decision of the Court of Appeals in the present case.

To show the general policy of the State of Arkansas, in addition to the Constitution, reference is made to Crawford & Moses' Digest, Sections 7368 to 7373. Those sections constitute what is known in Arkansas as the anti-trust law. We do not argue that those sections specifically cover the point in controversy. They do show, however, generally the public policy of said state.

In the case of *Shapard* v. *Lesser*, 127 Ark. 590 (1917), the court of Arkansas held void a contract the effect of which was to *stifle competition*, being, as we view it, the exact question involved here. The court used this language:

> "The avowed object of the contract, according to the allegations of the answer, was to stifle competition and to promote a monopoly in the cotton seed business to the manifest injury of the public."

In the case of *Jeffrey* v. *Ficklin*, 3 Ark. 227 (1841), the court held invalid a wager contract, apparently made upon the result of the national election of 1840.

The stake was a saddle. The loser was to give his note to the merchant in payment for the saddle. The case is not exactly in point, but it shows that any contract contrary to the *public policy* of the state is void. The court said:

> "Wagers, contrary to public policy, that are immoral, or affect the feelings, interests, or characters of third persons, are contrary to sound policy, and are not recoverable in law."

A similar question came before the Supreme Court of Arkansas in *Horn* v. *Foster*, 19 Ark. 346 (1858). In that case the said court held that there was no statute in Arkansas at that time prohibiting wagering on elections except as applied to judges and clerks. Notwithstanding that, the court held that such a wagering contract was against public policy and void.

In the case of *Hanauer* v. *Gray*, 25 Ark. 350, there were two considerations supporting the note sued on. They were Confederate bonds and Tennessee money. The court held the consideration of the Confederate bonds void as against public policy, but upheld the contract because Tennessee money was held to mean current coin of the United States.

In the case of *Woodruff* v. *Berry*, 40 Ark. 252 (1882), a case cited by this court in *Gibbs* v. *Consolidated Gas Company*, 130 Ark. 396, it was held that an agreement between bidders for the job of public printing, *which tended to stifle competition*, was illegal and void.

In *Lindsey* v. *Rottaken*, 32 Ark. 619 (1878), the question was whether it was against public policy or

a statute for the City of Little Rock to issue warrants. The court held the transaction against public policy and void, saying:

> "So a contract invading any one of the other interests which the law cherishes, though the thing to be done or promoted is not indictable, and not prohibited by any statute, termed a contract against public policy (or sound policy) is likewise void."

In the case of *Edwards* v. *Randle*, 63 Ark. 318 (1896), the court held that a contract for the sale of the fixtures of a post office, in which the vendor was the postmaster, in which contract the postmaster agreed to resign his office and recommend the appointment of the vendee as his successor, was "void as against public policy." The Arkansas court in that case quoted the definition of public policy from the author Greenhood.

In *St. L., I. M. & S. Ry. Co.* v. *Matthews*, 64 Ark. 398, the Arkansas court held that a contract between a locomotive engineer and a railroad company for perpetual employment of the engineer was against *public policy and void.*

In the case of *Kizer* v. *Texarkana & Fort Smith Ry. Co.*, 66 Ark. 348 (1899), the court held a contract between a railroad company and a patron to be void because in conflict with public policy. That case came before this court, but the writ of error was dismissed.

Kizer v. *Texarkana & Fort Smith Ry. Co.*, 179 U. S. 199.

In *Tallman* v. *Lewis*, 124 Ark. 6, a contract between a Board of Improvement and a member was

held void as against public policy. In that case the Arkansas court quoted from the opinion of this court in *Bank of United States* v. *Owens*, 2 Pet. 527.

In *Patterson* v. *Rogers*, 148 Ark. 222, the Arkansas court upheld a contract between private parties which was in partial restraint of trade, using this language in the syllabus:

> "Contracts in partial restraint of trade will be upheld *unless they result in the creation of a monopoly*" (italics ours).

That language and the rulings of the same court in the former cases indicate that *public policy condemns any contract which tends to create a monopoly.*

We will now notice the Arkansas cases cited by petitioners.

The first case is *Webster* v. *Williams*, 62 Ark. 101. The contract there involved was that of a physician selling his practice and agreeing to retire from the practice of medicine in a given town. The case involved the doctrine of partial restraint as applied to individuals. It did not involve the invalidity of partial restraint by a public utility.

The next case is *Keith* v. *Herschberg*, 48 Ark. 146. The same remarks apply to that case.

The next case is that of *Fort Smith Light & Traction Company* v. *Kelley*, 94 Ark. 461. In our opinion, *that case* when properly examined *is an authority against the contention of the petitioners.* Kelley and the Mansfield Gas Company were owners of gas wells and pipe lines. Kelley secured a franchise to furnish natural gas to the inhabitants of Fort Smith. Some

of the pipe lines were constructed by him and the Mansfield Gas Company. Then and prior thereto the Fort Smith Light & Traction Company had a franchise to manufacture and sell artificial gas in Fort Smith.

It was contended by Kelley in that case (p. 474) that if said contract excluded Kelley from furnishing gas in Fort Smith for forty-nine years, such provision was in restraint of trade and competition and against public policy and law and unenforceable. Kelley had assigned his rights under the ordinance to the Fort Smith Light & Traction Company. The contract included one of purchase, purchasing all the pipes and distribution system of Kelley and also obligated Kelley and his company to furnish gas for the life of the franchise. *That right*, however, to furnish gas *was not exclusive*. It was expressly provided in the contract that if gas should be offered to the Traction Company *by other parties* at a lower price, the Traction Company had the right to accept such other gas. It was also provided that if Kelley should meet the competition, thus presented, he would still preserve his right to furnish gas. Therefore, said contract, instead of being *in restraint of competition*, by express language *preserved competition*, giving the public the benefit of obtaining gas from other producers at a lower figure. Kelley took the view that (p. 474) when the Traction Company refused to take his gas but accepted lower gas from other parties, it broke the contract and authorized him to furnish gas to the public by reason of the ordinance and through the pipes which he formerly owned. The court held that that was an erroneous view of the contract.

Since said contract expressly preserved competition from any producer, the Arkansas court correctly held that it was not in restraint of trade. It preserved competition instead of destroying it. We think the said court expressly recognized the rule so clearly declared by the Court of Appeals in the instant case in the use of the following language:

> "One purpose of the law in prohibiting contracts in restraint of trade is to encourage competition and thereby lower the prices of services and commodities to the public."

In discussing said contract, the Arkansas court used this interesting language:

> "It was impossible for the consumer to be oppressed by a monopoly in the price of natural gas *under the terms of this contract, for by its terms appellant's pipes were open to every producer who applied for admission at a lower rate*" (italics ours).

In the instant contract, there is no such provision. On the other hand, no producer will be permitted to sell to the respondent any gas regardless of whose pipes convey the gas; and further there is absolutely nothing in the present contract which would permit the gas of other producers to come through the pipes of the petitioners. The contract there considered is clearly not one tending to destroy competition, but encourages competition and authorizes it to the extent that the gas may be brought to the consumers through the very same pipes. The said court (p. 475) therefore expressly stated that since said contract preserved competition and created no monopoly "inju-

rious to the rights of the public," the same was valid. Having thus held that said contract did not tend to create a monopoly, it was *obiter for the court to add the language quoted by petitioners on page 16 of their brief.* Since there was no restraint in that contract and no destruction of competition, it was immaterial to discuss a contract wherein there was a partial restraint of trade.

Petitioners on page 19 of their brief refer to the action of the respondent as being a "flagrant breach of contract." That suggestion has been repeatedly made throughout petitioners' conduct of this litigation. It is without merit. It is not wrong or immoral to refuse to perform a void contract.

Petitioners also refer to Section 7492 of Crawford & Moses' Digest. See brief page 22. The statute is not applicable. The petitioners did not have any exclusive franchise. It was so held in the case of *Citizens Pipe Line Company* v. *Twin City Pipe Line Company,* 178 Ark. 309.

The law on the subject seems to be the same as that declared by the Court of Appeals of the Eighth Circuit in the States of New York, Pennsylvania, Illinois and Georgia.

Judd v. *Harrington,* 139 N. Y. 105.
People v. *Sheldon,* 66 Hun. 590.
Nester v. *Continental Brewing Company,* 161 Pa. St. 473.
Morris' Run Coal Company v. *Barkley Coal Co.,* 68 Pa. St. 173.
Chicago Gas Light and Cook Company v. *The Peoples Gas Light and Cook Company,* 121 Ill. 530.

Western Union Telegraph Company v. *American Union Telegraph Company*, 65 Ga. 160.

Conclusion.

Petitioners in conclusion refer to two cases cited on page 19 of their brief. *It is respectfully submitted that the opinion of the Court of Appeals of the Eighth Circuit followed strictly the rule laid down by this court in those cases.*

We therefore respectfully submit that the petition for certiorari should be denied.

JOSEPH R. BROWN,
JAMES B. MCDONOUGH,
Counsel for Respondent.

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No. 330.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930.

TWIN CITY PIPE LINE COMPANY AND INDUSTRIAL OIL AND GAS COMPANY,
PETITIONERS,

VS.

HARDING GLASS COMPANY, RESPONDENT.

BRIEF OF RESPONDENT.

JOSEPH B. BROWN,
JAMES B. McDONOUGH,
Counsel for Respondent.

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No. 330.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930.

TWIN CITY PIPE LINE COMPANY AND INDUSTRIAL OIL AND GAS COMPANY,
PETITIONERS,

VS.

HARDING GLASS COMPANY, RESPONDENT.

BRIEF OF RESPONDENT.

STATEMENT OF THE CASE.

The respondent contends that the statement of the case made by counsel for the petitioners is incomplete and that said statement omits important facts which throw light upon the tendency of the contract in controversy. The additional facts tend to show that the contract stifles competition.

The evidence is voluminous, made so by the many documents introduced by the petitioners, which docu-

ments extend from page 20 to page 143 of the record. These documents include the complaints, demurrers, answers, District Court opinions in the three cases which were consolidated and tried in the Federal Court under No. 448, and another case (R. 190-211).

The respondent (R. 218) located its business and plant for the manufacture of window glass at Fort Smith (R. 224) in December, 1917. It located at that place because of the discovery of a great gas field in Crawford County, Arkansas, near Fort Smith. The discovery of such a gas field always attracts manufacturers using gas as a fuel. This one was no exception to the rule. Said manufacturers were offered gas at four cents (*Clear Creek Oil & Gas Co.* v. *Fort Smith Spelter Co.*, 148 Ark. 260; *Fort Smith Spelter Co.* v. *Clear Creek Oil & Gas Co.*, 267 U. S. 231). In all such fields the gas at first is usually developed by sharply competing companies. As the gas field grows and becomes more important the earlier companies sell out and the gas falls into the control of the larger companies, and the price is usually increased. The gas field under consideration (see the evidence of A. G. Williams, Jr., General Manager of petitioners, pp. 169, 170, 171, 172, 173, 174, 180), was developed by three separate interests. A great field of gas was discovered a short distance east of Fort Smith, in Crawford County. The Clear Creek Oil and Gas Company brought in the first wells. That company was a producing company as well as a transportation company and distributing company, and it was a public utility. Another interest was represented by the Crowe Oil

and Gas Company, which was a producing company, and its associate, the LaSalle Oil and Gas Company, which was a transporting and distributing company. The next interest, making the third, was the Twin City Pipe Line Company and its then associate company, the Wild Cat Oil and Gas Company. The three companies were sharp competitors in the production, distribution and sale of gas. The Wild Cat Oil and Gas Company went out of business in 1919 (R. 172), and the petitioner, the Industrial Oil and Gas Company, was organized in March of that year. The petitioner, the Twin City Pipe Line Company, was organized in March 1916. The Twin City Pipe Line Company (R. 172) did not control wells or produce any gas. No contract is shown between that company and the Industrial Oil and Gas Company whereby the latter can be compelled to furnish gas to the Twin City Pipe Line Company. The competition between the three interests thus described lasted until the petitioners secured complete control and ownership of all gas fields in Crawford County. The Fort Smith Light and Traction Company (R. 173) had a distributing system within the cities of Fort Smith and Van Buren at the time of the making of the contract, and before, and said company owned pipe lines between the two cities. The LaSalle Oil and Gas Company owned pipe lines connecting Van Buren with the pipe lines of the Fort Smith Light and Traction Company, thus enabling the LaSalle Company to transport its gas to Fort Smith. The Clear Creek Oil and Gas Company owned pipe lines from the gas fields to Van Buren and, also, from

Van Buren to Fort Smith, and to South Fort Smith. The map following page 148 shows the location of these various pipe lines. The Twin City Pipe Line Company, one of the petitioners, owned pipe lines from the gas fields in Crawford County to Van Buren, and also into Fort Smith. The three interests, therefore, were competitors in the furnishing of gas in the two cities of Van Buren and Fort Smith, and their environs.

Prior to 1923 S. H. Hale was not interested in that gas field. Some time prior to July, 1923, the exact date not being given, S. H. Hale acquired all the gas rights, gas fields, transportation lines and property of the Crowe Oil and Gas Company, the LaSalle Oil and Gas Company, and the Clear Creek Oil and Gas Company; thereby coming into the possession of all the properties, gas fields and systems of two of the interests above described. That left in the field two competitors, the Hale Companies and the petitioner. Hale soon began an active development of the properties, and developed an additional great gas field at Alma. Hale, finding himself in possession of a great supply of gas, began active competition for furnishing said gas to the consumers in Fort Smith and its environs. In July, 1923 (R. 93, 133, 134), said Hale entered into a ten-year contract with the Fort Smith Light and Traction Company to supply that company with gas at ten cents; under certain conditions at twelve and a half cents (R. 135, 136). That contract was made under the name of the LaSalle Oil and Gas Company. Soon after the making of that contract said Hale succeeded, in pushing his competition against petitioners, in mak-

ing a contract with the respondent on the 6th day of October, 1923 (R. 30, 240). In that contract Hale agreed to sell, and the respondent agreed to buy all of the respondent's requirements of gas for the five years ending October 30, 1928. Hale was enabled to make this contract by offering the gas at a lower price, which was ten cents. Hale thus in a short time, by reason of a great supply of gas and a lower price, succeeded in taking away from the petitioners two important customers.

Within a week after the contract between Hale and the respondent (see District Court's opinion p. 131), the petitioners entered into a contract with Hale and his corporations, whereby petitioners bought all the gas properties of Hale and took over and assumed all the contracts of Hale, including Hale's contract to furnish respondent with gas for five years at ten cents.

There was another person with gas holdings in the said gas fields. G. T. Cazort, a large land owner in Crawford County, had developed a considerable quantity of gas (R. 20, 170). That gas prior to January 20, 1925, was held under a short time contract by Hale and the petitioners. That contract would expire in about a year (R. 170). On the date last named the petitioner, the Industrial Oil and Gas Company, acquired an extension of its rights on the Cazort gas. Within four days (R. 220) after the Industrial Oil and Gas Company, the petitioner, thus secured the Cazort gas, the Twin City Pipe Line Company (and not the Industrial Oil and Gas Company, which had bought the Cazort gas), through its Superintendent,

notified the respondent that said petitioners would no longer furnish gas to the respondent at *the ten cent rate,* and that on and after February 1, 1925, the respondent would be billed at the city rate of *fifteen cents* (R. 222). From the time of the purchase of the Hale interests and the assumption of the Hale contract by respondent until that date (January 24, 1925), the Twin City Pipe Line Company furnished gas to the respondent, at the Hale contract rate of ten cents. In the letter (R. 220) the petitioner, the Twin City, contended that Hale contracted to furnish respondent with gas from one well only. *Hale's contract is not so worded* (R. 240). Said letter also claims that it is the intention of the petitioner "to carry out the contract." The letter, however, contradicts that assertion by stating that from February 1, 1925, gas will be charged at the *fifteen cent* rate. The respondent insisted that the Hale contract was valid and that petitioners had assumed its obligations, and that the respondent was entitled to ten cent gas for the period named. The Twin City sent bills to the respondent at the fifteen cent rate and the respondent paid the bills at the ten cent rate. The petitioner, the Twin City, in order to get rid of the ten cent rate and to collect the difference between that rate and the city rate, brought suit No. 1192 (R. 23) and also suit No. 1200 (R. 47). The first suit was brought in the State Court and removed by the respondent to the Federal Court. In the meantime the respondent had brought a suit in the Federal Court known as 448, seeking to compel Hale and the petitioners to comply with the Hale con-

tract and to furnish gas at ten cents for the five years. The suits brought by the Twin City were finally consolidated by stipulation after the District Court had denied respondent's motion to transfer said causes to the equity docket, and consolidated them with its suit 448. *The respondent in said suit* 448 *won its contention that the Hale contract was valid and that it was entitled to ten cent gas.* The petitioners alleged in that litigation that said contract (R. 77, 78, 79) was void. They admitted that they had adopted the contract, but claimed that they were not bound by it because it was void. The District Court in that case relieved the Twin City Pipe Line Company of the obligation of that contract because it was a public utility. The court held that said contract was a valid contract, however, and rendered a judgment against *Hale* in favor of the respondent for the sum named in the judgment of the Twin City against the respondent. The same decree also gave Hale a judgment over against the Industrial Oil and Gas Company. Hale, the respondent, and the Industrial Oil and Gas Company all appealed from that decree. After the appeal was lodged in the Court of Appeals of the Eighth Circuit the parties to that litigation settled the matters involved in that litigation. *There was not,* however, involved in that litigation any question as to an *exclusive contract* between respondent and the Twin City Pipe Line Company as to the taking of gas. The respondent (R. 30), from 1916 to the making of the Hale contract, had taken all its requirements of gas from the Twin City Pipe Line Company without any contract whatever. The Twin

City, in the discharge of its duty as a public utility, furnished that gas without a contract.

The respondent had contended in the litigation, and that was one of the purposes of the suit, that the Twin City Pipe Line Company, by using an insufficient pipe as a service pipe, discriminated against the respondent in the furnishing of gas, and further contended that as a result of that discrimination the respondent, in the winter of 1924-1925, suffered a shortage of gas and suffered a loss (R. 225) in excess of $50,000.00, which it did not recover. Immediately after the winter of 1924-1925, stockholders of the respondents, and others, began efforts to develop a gas field just across the river from Fort Smith, in the State of Oklahoma. That was made necessary, as respondent believed, because of the threatened raise of the price of gas by the petitioner, the Twin City, and because the respondent could not pay more for its gas than it was paying, and meet its competition and retain its plant in Fort Smith. The respondent had been offered cheaper gas at other cities, but preferred to remain in Fort Smith provided it could secure the necessary fuel gas. For that reason the officers of the respondent with others began the developments to secure its own supply of gas, which developments were successful. The officers of the respondent, and other interested citizens, united in the organization of the Citizens Gas Company for the purpose of that development, which company was organized March, 1926 (R. 239), many months before the contract in controversy was entered into. The develop-

ments began before said organization in the summer of 1925 (R. 226).

After the present suit was brought, and for the purpose of defeating the efforts of the respondent to secure a supply of gas, the petitioner, the Twin City Pipe Line Company (R. 190-201), brought a suit in the State Court to enjoin the Citizens Pipe Line Company, which, together with the Citizens Gas Company, had invested nearly $100,000.00 to secure a supply of gas for the respondent, from laying its pipe line along Johnson Street and to the plant of the Harding Glass Company in Fort Smith. That suit was brought after the present suit was brought. The Supreme Court held that that suit was without merit and dismissed it. The pleadings, and even the opinion of the Supreme Court in that case, were introduced as testimony by petitioners in this case (R. 190-211).

The transactions above set forth left the petitioners in control of substantially all the gas produced in Crawford County, and left outstanding the Gans gas which was developed by Hale and which was located some fifteen or twenty miles west of Fort Smith, in Oklahoma. There was also a small quantity of gas produced by the Fort Smith Light and Traction Company. Before this case was tried the petitioners purchased from Hale the Gans gas. That was a deal made between two individuals, as petitioners' evidence showed. Respondent endeavored to secure that contract. It was not produced, and the District Court sustained petitioners' objection to the production of the same (R. 175-176). About that time the Fort Smith

Gas Company was organized by the petitioners for the purpose of taking over all gas interests and distributing systems of the Fort Smith Light and Traction Company. Therefore, at the time of the trial the petitioners were the owners of substantially all gas supplies except the gas of the Citizens Pipe Line Company and the Orr gas, which is the gas of the LeFlore County Gas and Electric Company. The fields of that company are located about twenty-five miles southwest of Fort Smith, and a pipe line runs from those fields to a point in Oklahoma near Fort Smith.

Consideration of the Contract.

Petitioners claim that the contract was supported by the construction of an eight inch pipe line at a cost of $4,489.82. As a matter of truth the petitioners made a handsome profit out of the deal whereby the Twin City obligated itself to build the eight inch pipe. As before stated, the respondent claimed that it was the duty of the petitioner, the Twin City, under the Arkansas statute (for said statute see District Court's Opinion, p. 141) to furnish a sufficient pipe. Respondent offered to pay the expense of that (R. 89). The respondent offered to prove (R. 219) that the President of the petitioners who prepared the contract and brought it to the respondent for signing, stated that the Twin City would do better than was agreed to in the negotiations. The Superintendent of the petitioners admitted (R. 185-186) that said eight inch pipe was some benefit to the petitioners. By looking at the map following page 148 it is clear that said eight inch pipe

is a benefit. It connects the ten inch pipe which comes from the gas fields with the eight inch pipe, and enables the petitioner, the Twin City, to furnish gas in the event of a breakdown of either pipe by bringing the gas over the other pipe.

The respondent, as to the consideration, claims that the undisputed evidence in the record shows that the Twin City Pipe Line Company made a profit of $41,419.99. The petitioners introduced evidence showing the amount of gas consumed by the respondent (R. 160) for the five year period ending October 30, 1928. By getting rid of the ten cent rate in the contract under consideration the additional profit over the ten cent rate, by collecting on the city rate, amounts to $45,909.81. The Twin City claims that it spent in the construction of the eight inch pipe $4,489.82; therefore, the petitioner, the Twin City, made a net profit of $41,419.99.

The petitioners further claim that the Twin City satisfied the judgment of $17,155.46. That was a judgment against the respondent for that sum. The respondent, however, had a judgment over against Hale for the same sum and Hale had a judgment over against the petitioner, the Industrial Oil and Gas Company, for the same sum; therefore, the Twin City lost nothing in satisfying that judgment, and made a net profit of $41,419.99.

ARGUMENT.

The respondent will discuss the points raised in petitioners' brief in the order therein set out.

POINT ONE.

THE DECISION OF THE COURT OF APPEALS OF THE EIGHTH CIRCUIT IN THIS CAUSE IS NOT IN CONFLICT WITH THE DECISIONS OF OTHER CIRCUIT COURTS OF APPEAL ON THE SAME MATTER.

Counsel for the petitioner argue that the decision of the Circuit Court of Appeals of the Eighth Circuit is in conflict with the decision of the Circuit Court of Appeals of the Tenth Circuit on the same matter, and in support of their contention cite the case of *Griffin et al.* v. *Oklahoma Natural Gas Corporation,* 37 Fed. (2d) 545. Counsel for petitioners (Brief p. 10) claim that the Oklahoma Natural Gas Corporation was a public utility. They are not supported in that contention by the facts in that case. The contract in that case was made by the City of Iola, Kansas, and the J. B. Kirk Gas & Smelting Company, which company was not a public utility. That company assigned the contract to the Oklahoma Natural Gas Corporation and there is nothing in the report of the case to show that that corporation was a public utility. In showing that the Oklahoma Natural Gas Corporation was not a public utility, the Court of Appeals of the Tenth Circuit in that case said: "The Oklahoma Corporation had no franchise and could not dispose of such gas at retail at Iola." Besides, the court in that case expressly stated that the City "was the

only customer for such gas at Iola." It therefore appears positively that the gas corporation, as to that contract, was not a public utility and was not acting as such. The City of Iola, in making the contract, was acting in its business or proprietary capacity and not as a governmental agency. In 1927, said City of Iola entered into a contract with the J. B. Kirk Gas & Smelting Company by which said Company agreed to sell and deliver to the City, and the City agreed to buy, all the natural gas required by the City for fuel in the operation of its electric light and water works power plant. The City agreed to buy, for the five years, all its fuel from said Company. The grantee in said ordinance failed to give satisfactory service, and finally assigned its rights under the contract to the Oklahoma Natural Gas Corporation. When said corporation took over the properties it made a survey and expended the sum of $310,000.00 in additions and betterments for the purpose of assuring a gas supply to the City. After the assignment of said contract to said corporation, one Griffin, a former employee of the Oklahoma Corporation, entered into a contract with the City by which he agreed to sell natural gas to the City for one year. The District Court enjoined Griffin and the City from carrying out said last named contract. On appeal the City and Griffin contended that the City was without power to make the contract for more than a year. The court denied that contention, and held that the contract was valid "if the period of their duration is a reasonable one under the existing facts and circumstances." The court held that the

period of five years was a reasonable one, and denied the City's contention. It was further contended by the City and Griffin that the contracts were "void because in restraint of trade." The court held that if the restraint was reasonable, under the particular facts and circumstances, the contracts were not invalid because of such restraint of trade. The court, therefore, did not decide the case upon the theory that either party thereto was a public service corporation. The Oklahoma Natural Gas Corporation was not at the time obligated by any public duty to furnish the gas to the City as a customer. No such duty existed, under the law, either from the predecessor of such corporation or from the corporation itself. Hence that case did not turn upon the fact that either party to the contract was a public utility. That seems clear. The case, therefore, was one between two corporations engaged in private business of buying and selling gas. In holding that the City of Iola was acting as a business corporation, the Court of Appeals of the Tenth Circuit cited the well known case from the Eighth Circuit, *Ill. T. & S. Bank* v. *Arkansas City*, (C. C. A. 8) 76 Fed. 271. The said court, therefore, correctly held, under those facts, that the expenditure of money by the Oklahoma Corporation "and the fact that the City was the only customer for such gas at Iola, an exclusive contract for a period of five years was reasonable." It seems clear, therefore, that said case did not turn upon partial restraint of trade by a *public utility* in making a contract with its *customer*, to perform a duty which it is obligated to perform, under the law, on condition

that the customer bind itself to take all of its requirements from said public utility.

Passing for the present petitioner's discussion of a subsidiary question on pages 12 and 13 of its brief, we will notice the case of *Montgomery Traction Company* v. *Montgomery Light & Water Power Company*, 229 Fed. 672, which case, petitioner claims, is in conflict with the decision of the Court of Appeals of the Eighth Circuit in the instant case. That case involved the construction of a contract whereby the Light and Power Company agreed to sell, and the Traction Company agreed to buy, electricity for the operation of the street cars for a period of fifteen years. For that period said contract was exclusive. The electricity was purchased for propelling, lighting, and heating the Traction Company's passenger and freight cars. Said case first appears in 191 Fed. 657. The case was submitted to the district judge on a demurrer to the complaint. That opinion recites that the Power Company is a *quasi* public corporation, engaged in generating and supplying electrical current for lighting and power purposes to individuals and the public; and further recites that the Traction Company is another *quasi* public corporation engaged in the street car business. Eight years of the contract had expired. In order to be able to furnish the additional electrical power to the Traction Company, the Power Company expended $200,000.00 in machinery and apparatus. The Traction Company (page 661) contended a court of equity would not compel the specific performance of such contract extending over a period of years. The

Traction Company further contended that the court could not compel specific performance, because the parties might terminate the contract before its expiration. Other contentions were made, such as lack of mutuality and other matters. It does not appear, however, that the specific question involved here was raised or decided in that opinion. The principal question on which the court's decision on the demurrer turned was that of whether specific performance could be enforced, which question assumed the validity of the contract.

Said case next appears in 219 Fed. 963. That was a decision on the merits after trial. It was contended by the Traction Company there that said contract was against public policy because it delegated a part of the duty of the Traction Company to the public to another corporation, the Power Company. Using the language of the court the Traction Company's contention is, "the contention is that the respondent is a public service corporation and is bound by its charter to serve the public as a common carrier of passengers; that the contract between the respondent and the complainant, the basis of this suit, is an attempt to surrender or delegate the duties imposed upon respondent to another; and that therefore the contract is against public policy and void." It will, therefore, be observed that the Traction Company, in that case, made no contention that the contract was void on the ground on which the Court of Appeals, in the instant case, held the contract in controversy void. Hence in that case it was not contended or decided that a public utility, being obligated to furnish gas or electricity to all alike, would have the

right to require of a customer an obligation to take all the customer's requirements from the public utility. In upholding said electrical contract against the contention made by the Traction Company the District Court said:

> "On the contrary, it is evident that such contract merely provided a means by which respondent was to perform the duty imposed upon it by its charter and the discharge of which it owed the public."

Neither in the Griffin case nor the Montgomery case did there exist a duty on the part of the public utility to furnish gas or service to a consumer. The purchaser in each case, without a contract, had no right to demand the service from the sellers. The Montgomery case next appeared in 229 Fed. 672, where it appears said case was considered by the Court of Appeals of the Fifth Circuit. Said Court of Appeals of the Fifth Circuit did not in any manner refer to, consider, or discuss the principle of law decided by the Court of Appeals in the instant case. Apparently, the Traction Company relied in the Court of Appeals more upon the *lack of mutuality* of remedy than anything else. The Court of Appeals held that the Traction Company would not suffer by reason of any lack of mutuality in said contract. Therefore, in the said cause on appeal, there were only three questions discussed. First, whether a foreign corporation could make a contract without complying with the laws of the State. In that the court held that the corporation had adopted the contract after it had complied with state

law. The second question was whether there was mutuality of obligation. The court decided that, as stated above. The third question was whether the specific performance of the contract could be compelled in equity.

If the Griffin Case Has the Meaning Given It by Counsel for the Petitioners, Said Case Is in Conflict With the Public Policy of the State of Kansas as Shown by Its Decisions and Statutes.

The Keene Syndicate v. *The Wichita Gas, Electric Light and Power Company,* 69 Kans. 284. The Supreme Court of Kansas, in holding the contract in that case invalid, used this language:

> "The inquiry should be whether the agreement, which, in its necessary or contemplated operation upon the actions of the party to it, tends to restrain their natural rivalry and competition, and thus to result in the disadvantage of the public or of third parties, is against the principles of sound public policy, and consequently void."

The contract involved in that Kansas case was one leasing to a rival corporation for a period of ten years machinery and appliances used in generating electricity, the seller obligating himself not to engage in the business of furnishing electric light and power to the public during that period. The Kansas court cited the case of *Western Wooden-ware Ass'n* v. *Starkey,* 84 Mich. 76, and *Gibbs* v. *Consolidated Gas Company,* 130 U. S. 396. We refer in that opinion also to the case of *Hutchinson Gas & Fuel Company* v. *Wichita Natural Gas Company,* (8th Cir.) 267 Fed. 35.

The contract in that case, as originally written, was an exclusive contract, and was held void in that form as it tended to establish a monopoly. Before the contract came into the courts the parties changed the same so as to remove the exclusive void features. The suit, in that case, was brought by the Hutchinson Company, a distributing company, to enjoin the Wichita Company, a natural gas producing company, from raising its rate for the sale of its gas, and from ceasing to supply the gas at a rate specified in the contract. The lower court refused to enforce the contract by injunction, and that decision was affirmed on appeal.

If the Montgomery Case in the Fifth Circuit, Above Referred to, Has the Meaning Given It by Counsel for the Petitioners Then Said Decision Is in Conflict With the Decisions of the Supreme Court of Alabama on the Subject of the Invalidity of Contracts as Being Against the Public Policy of that State.

The following Alabama cases hold that contracts like the one in controversy tend to establish a monopoly, and are, therefore, against public interest, and are void as against public policy.

American Laundry Co. v. *E. & W. Dry Cleaning Co.*, 199 Ala. 154; 74 So. 58.
Arnold v. *Jones Cotton Co.*, 152 Ala. 501.
Tuscaloosa Ice Mfg. Co. v. *Williams*, 127 Ala. 110.
Georgia Fruit Exchange v. *Turnipseed*, 9 Ala. App. 123.

It is respectfully submitted that for the court to follow the cases from the Fifth and Tenth Circuits, above discussed, would be the establishment of a public policy in the State of Arkansas, which would be in

conflict with the constitution and laws and decisions of said State of Arkansas. That question is more fully discussed under Points Two and Three.

It is respectfully submitted that the decisions of other Circuit Courts of Appeal are in line with the decision of the Eighth Circuit on the question involved herein.

Without comment, we refer to the following cases, which we think sustain respondent's contention on this point:

Oceanic Steam Nav. Co. v. *Corcoran* (2d Cir.), 9 Fed. (2d) 724.

Hubbard Ayer Inc. v. *Federal Transportation Co.*, (2d Cir.), 15 Fed. (2d) 274.

Continental Candy Corp. v. *California & Hawaiian Sugar Refining Co.*, (D. C. Calif.), 270 Fed. 302.

Davis v. *Jointless Fire Brick Co.*, (9th Cir.) 300 Fed. 1.

Sampliner v. *Motion Picture Patent Co.*, (2d Cir.), 255 Fed. 242.

B. V. D. Co. v. *Isaac* (6th Cir.), 257 Fed. 709.

Davis v. *Southern Pacific Co.*, (D. C. Calif.) 235 Fed. 731.

Waltham Watch Co. v. *Keene*, 209 Fed. 1007.

Western Union Telegraph Co. v. *Postal Telegraph Co.*, (9th Cir.), 217 Fed. 533.

Fox Solid Pressed Steel Co. v. *Schoen Mfg. Co.*, (3d Cir.), 84 Fed. 544.

Kellog Toasted Corn Flake Co. v. *Buck*, (D. C. Calif.), 208 Fed. 383.

Whitridge v. *Mt. Vernon Woodberry Cotton Duck Co.*, (D. C.), 210 Fed. 302.

Logan & Bryan Co. v. *Postal Telegraph Co.*, (D. C.), 157 Fed. 570.

Bailey & Graham v. *Phillips*, (5th Cir.) 159 Fed. 535.

C. M. & St. Paul Ry. Co. v. *Wabash*, (8th Cir.), 61 Fed. 993.

As a Matter of Law the Instant Contract on Its Face Tends to Create a Monopoly, and Is Therefore Void at Common Law.

The common law is the law of Arkansas. Crawford & Moses Digest, Section 1432.

There was, as a matter of law, a duty imposed by law upon the Twin City Pipe Line Company, being a public utility to supply respondent with its needed gas without discrimination and upon the same terms as to all other consumers. The obligation in said contract compelling the respondent, a customer, to take from the Twin City Pipe Line Company, a public utility, all its requirements of gas during the life of the gas field creates, or tends to create, a monopoly. Such a contract necessarily excludes from the field all other gas companies. In truth, therefore, this contract is in general restraint for trade instead of being merely in partial restraint of trade. The District Court below did not hold that the contract did not tend to establish a monopoly. The Court of Appeals did hold that said contract did tend to establish a monopoly.

Petitioners rely upon the case of *Shapard* v. *Lesser*, 127 Ark. 590. An examination of that case shows that said case is an authority against the contention of the petitioners. The effect of the agreement in that case was *to strifle competition*, which is the exact effect of the contract in the case at bar. Shapard and the Arkansas Cotton Oil Company entered into an agreement to erect and operate a cotton gin at Rondo, Arkansas. The Marianna Cotton Oil Company, having

a gin at that place, entered into a contract with Shapard for the purpose of preventing the establishment of the competitive mill at Rondo. The court held that the purpose of that agreement was to stifle competition and held the same therefor void as against public policy. The Arkansas court clearly distinguished the cases wherein parties have sold their business and obligated themselves for a reasonable time not to enter into the same business and the cases involving contracts which on their face showed that their effect was to stifle competition.

The Arkansas court used this language:

> "The avowed object of the contract, according to the allegations of the answer, was to stifle competition and to promote a monoply in the cotton seed business to the manifest injury of the public."

The said court cited some of the cases relied upon by the respondent herein. Other Arkansas cases along the same line are cited below under Point Three.

Pond on Public Utilities, Sections 205, 207.
6 Ruling Case Law, Section 204, page 803, and cases.
Central New York T. & T. Co. v. *Averill*, 199 N. Y. 128.
Chicago Gas Light Co. v. *Peoples Gas Light Co.*, 121 Ill. 530.

In the case of *United States* v. *Addyston Pipe & Steel Co.*, 85 Fed. 271 (afterwards considered by this court in 175 U. S. 211), Judge Taft, then circuit judge, said:

"But the sole object is to restrain trade in order to avoid the competition, *which has always been the policy of the common law* (italics ours) to foster."

It is therefore the respondent's contention that the contract under consideration on its face, as a matter of law, shows that it tends to establish a monopoly, and is therefore void.

However, because of the stress placed upon the matter by the petitioners, it is necessary to notice the decisions covering the point that a public utility cannot make a valid contract in any manner restraining trade. We will now under a separate paragraph discuss that question.

Partial Restraint of Trade Will not be Tolerated in a Contract Between a Public Service Corporation and Its Customers.

This is a subsidiary question to the one above discussed, but in our opinion, necessarily has its place in determining whether petitioners are entitled to the writ of certiorari in the instant case. A full discussion is essential because petitioners (Brief pp. 6 to 9) give it a great importance. In our opinion, the learned district court in this cause reached an erroneous result in part because of his misunderstanding the application of this doctrine to the instant case. The said court used this language:

"I do not think that the contract was in restraint of trade. If, however, it could be said to have had such an effect, it was only a partial restraint of trade."

From that language we are impressed with the view that said learned court was of the opinion that partial restraint of trade did not invalidate a contract when said contract was between a public service company and a customer. The common law of England was adopted by the State of Arkansas and is in force in that state.

Crawford and Moses' Digest, Section 1432.
Horsley v. *Hilburn*, 44 Ark. 458.
Hardage v. *Stroope*, 58 Ark. 303.

See the Arkansas Constitution, decisions and statutes cited under Point Three below.

In *Gibbs* v. *Consolidated Gas Company*, 130 U. S. 396, this court said:

> "* * * innumerable cases, however, might be cited to sustain the proposition that combinations among those engaged in business impressed with a public or *quasi* public character, which are manifestly prejudicial to the public interest, cannot be upheld."

It was the rule at common law, and the rule in Arkansas under common law, and we believe the rule everywhere, that a contract between a public utility and a customer, though only in partial restraint of trade, is yet absolutely void, because the public interest will not tolerate any kind of restraint in that respect by a public utility.

In 6 R. C. L., Section 204, page 803, the rule is thus declared:

> "The ordinary rule that contracts in partial or reasonable restraint of trade are not invalid,

does not apply to corporations engaged in a public business. In fact it may be said that if there is any sort of business which from its peculiar character can be restrained to no extent whatever without prejudice to the public interest, the courts would be compelled to hold void any contract imposing any restraint, however partial, on this peculiar business, provided, of course, it is shown clearly that the peculiar business thus attempted to be restrained is of such a character that any restraint upon it, however partial, must be regarded by the court as prejudicial to the public interest."

Many cases are cited in support of that doctrine, some of which are cited by the Court of Appeals of the Eighth Circuit in its opinion in this case (R. 256, 257, 258).

We think that rule is established by this court in the case of *Gibbs* v. *Consolidated Gas Company*, 130 U. S. 396. In that case, this court in substance stated that if the contract was forbidden by public policy, it was void. In the body of the opinion, this court, through Mr. Chief Justice Fuller, used this language:

> "Hence, while it is justly urged that those rules which say that a given contract is against public policy, should not be arbitrarily extended so as to interfere with the freedom of contract (*Printing Co.* v. *Sampson*, L. R. 19 Eq. 462), yet, in the instance of business of such character that it presumably cannot be restrained to any extent whatever without prejudice to the public interest, courts decline to enforce or sustain contracts imposing such restraint, however partial, because in contravention of public policy."

In support of that, this court cited in said opinion many authorities and we deem it unnecessary to review them here.

As to the public nature of the gas business, this court, in the Gibbs case, said:

> "The supplying of illuminating gas is a business of a public nature to meet a public necessity; and where such business cannot be restrained without prejudice to the public interest, contracts imposing such restraints, however partial, will not be enforced or sustained, because in contravention of public policy."

In Wyman on Public Service Corporations, Section 685, this language appears:

> "It is therefore idle for a public service company to attempt to ward off competition by entering into exclusive contracts for terms of years."

The same author, at Section 691, points out the very difference which the learned District Court failed to recognize. It is there said:

> "It is a safe principle to go by that no arrangement will be enforced by the courts whereby public service is hampered, even if such arrangements are generally supported where private business is involved."
>
> See *W. Va. Transport Co.* v. *Ohio River Pipe Line Co.*, 22 W. Va. 600.

We cite the following cases on the same point without comment:

Gwynn v. *Telephone Co.*, 69 So. C. 434; 48 S. E. 460.

Salt Co. v. *Guthrie*, 35 Ohio St. 672.

Pond on Public Utilities, Sections 205, 207 and cases cited.

Central New York T. & T. Co. v. *Averill*, 199 N. Y. 128.

Amarillo Oil Co. v. *Ranch Creek Gas Co.*, (Texas) 271 S. W. 145.

Love v. *Kozy Theatre Co.*, 193 Ky. 336.

It is the tendency of the contract which makes it void as against public policy.

Reeves v. *Decorah Farmers' Cooperative Society*, 160 Iowa 194.

W. W. Montague & Co. v. *Lowry*, 193 U. S. 38.

Anderson v. *Jett*, 89 Ky. 375.

Chapin v. *Brown Bros.*, 83 Iowa 156.

Boutwell v. *Marr*, 71 Vt. 1.

13 Corpus Juris, page 480, Section 423.

Barrow v. *McMurtry Mfg. Co.*, 54 Colo. 432.

Anderson v. *Shawnee Compress Co.*, 17 Okla. 231.

19 R. C. L. 36.

In Joyce on Monopolies, Section 92, page 119, the author says:

> "The rule that agreements in general restraint of trade are void while those in partial restraint when reasonable and founded upon a valid consideration are valid is declared to be not applicable to corporation engaged in a public business."

See also page 120, same book.

Union Trust Co. v. *Kinloch T. Co.*, 258 Ill. 202.

In *Sampliner* v. *Motion Picture Patent Co.*, 255 Fed. 242, the court said:

> "The question of whether a contract is void as contrary to public policy is determined by its general tendency, and if that is opposed to the

interests of the public, the contract is void, even though in the particular case the intent of the parties may have been good, and no injury to the public may have resulted."

This court, in the case of *Weil* v. *Neary;* 278 U. S. 160, said:

"An agreement against public policy is void even though the intent was good and no injury resulted."

Counsel for the petitioners criticise the decision in the case of *Coombs* v. *Burk,* 40 Cal. App. 8; 180 Pac. 59. It is claimed by said counsel that that case (Petitioner's Brief, page 23), has never been cited or approved by any other court except the court below. It is submitted that said counsel in that statement seriously erred. Said case of Coombs vs. Burk was cited with approval by the California Court in the case of *Fidelity Assurance Company* v. *Cosby,* 90 Cal. App. 25; 265 Pac. 372.

Besides, said case of Coombs vs. Burk has been cited by some of the ablest text writers, men known for their ability as law writers, such as Elliott on Contracts and Williston on Contracts.

Elliott on Contracts and new Supplement, Section 817.

In note 24, the author says:

"A contract by which a gas company agrees to install for a consumer certain appliances in consideration of the latter's agreement to purchase all gas used from the company or pay a certain sum is void," citing the case of Coombs vs. Burk.

The author in Section 817 cites the following cases:

Arnold v. *Jones Cotton Co.*, (Ala.) 12 L. R. A. (N. S.) 150, and note.

Chicago, I. & L. Ry. Co. v. *Southern Ind. Ry. Co.*, (Ind.) 70 N. E. 843.

In Williston on Contracts, Section 1645, the author states:

> "A contract to sell within a certain territory goods of a specified kind to or through the agency of one person only generally is valid; but it is otherwise if such a contract is part of a scheme whereby it is sought to establish a monopoly; or if freedom of dealing with a public service company is impaired, it will not be enforced," citing Coombs vs. Burk.

The cases heretofore cited, as well as Section 1645 of Williston on Contracts, show the difference between the two classes of contracts. As the court below well reasoned, such contracts tending to establish a monopoly are void because against public policy and in restraint of trade.

In support of the principles declared by the California court in said case of Coombs vs. Burk, it is believed that a number of cases from the Supreme Court of California sustain the rule announced by the Court of Appeals in the instant case.

See:

Santa Clara Valley Mill & Lumber Co. v. *Hayes*, 76 Calif. 387.

Shasta County v. *Moody*, (Calif.), 265 Pac. 1032.

In the case of *Tuscaloosa Ice Manufacturing Company* v. *Williams*, 127 Ala. 110, the court in holding a contract which stifled competition invalid said:

> "It tends to injure the public by stifling competition and creating a monopoly. Its manifest purpose, even upon its face, and certainly when taken in connection with the facts averred in the plea, was to secure to the covenantee a monopoly in the production and sale of ice in the Town of Tuscaloosa and vicinity, and such is its operation and effect."

See 13 Corpus Juris, pages 478 and 481, and cases there cited.

The Griffin, the Montgomery and the Fort Smith Light and Traction Company cases (94 Ark. 461), which latter case will be discussed under Point Three, belong to a different class of cases from the instant case. The theory upon which the contracts in the class of cases like those just mentioned are sustained, is that they are in the interest of the public and aid the public service corporation to serve the public. Such contracts do not conflict with public interest and do not tend to establish a monopoly. The petitioner owed a public duty to the respondent to furnish gas without discrimination upon the same terms that it furnished gas to all other consumers. A public utility owing the duty to supply gas to all alike cannot lawfully contract with one customer requiring that customer to take all his requirements from the public utility. If the utility can require that of one, it can require it of all. If it can require it of all, it establishes a monopoly to the injury of the public and

against the Constitution and Laws of the State of Arkansas.

The Alleged Consideration in the Contract Is Immaterial and Does Not Make the Contract Valid.

This question is discussed under Point One of petitioner's brief beginning on page 12. The rule is universal that a good and valuable consideration will not support a contract which is void because against public policy.

6 Ruling Case Law, Section 14, page 707 and cases.
6 Ruling Case Law, Section 204, page 803 and cases.
6 Ruling Case Law, Section 214, page 814 and cases.
13 Corpus Juris, pages 478 to 481, and cases.

Upon the facts in this record established by the evidence of the petitioner itself, there is no basis for the argument that the settlement of the then pending litigation was a consideration moving from the petitioners to the respondent. The principal purpose of that litigation, as is shown by the complaints and answers of the respondent, was to establish the respondent's right to gas at the price of ten cents for five years ending October 30, 1928. A brief reference to the pleadings which were introduced by the petitioner will make this contention clear.

The petitioner, the Twin City Pipe Line Company (R. 23), brought two suits in the state court seeking judgment for the difference between the city rate and the ten cent rate of the Hale contract. The respond-

ent (R. 26-29) removed those cases to the United States District Court. The respondent (R. 29) in that court filed an answer setting up equitable defenses and asserting its right as against the Twin City Pipe Line Company under the Hale contract to have gas furnished it by the Twin City Pipe Line Company for the five year period named under the Hale contract. The Hale contract (R. 30-33) plainly obligated said Hale to furnish to the respondent all its requirements of gas for its plant at ten cents for the period ending October 30, 1928. The District Court at first denied the motion of the respondent to transfer the case to equity. Later (R. 44) by stipulation the case was transferred to equity and Hale was made a party. One week after the making of said contract between Hale and the respondent (R. 131) the petitioners, evidently fearing the competition of Hale and his gas companies, by a contract in writing purchased from Hale and his companies all their gas wells, pipe lines, distribution systems and gas rights, and assumed the liabilities of the contracts of Hale including the one with the respondent. The Hale contract was specifically named in the purchase by the petitioners of the interests of Hale. The petitioners in their contract of purchase from Hale and his corporations (R. 133) bound themselves to hold Hale harmless from any judgment that the respondent might secure against Hale for any breach of Hale's contract to furnish the ten cent gas for the full term of said contract (R. 133). The petitioners reserved the right to defend any litigation brought by the respondent against Hale, and

assumed all responsibility and liability that might result from any such litigation, and expressly provided that they should have the right to conduct the litigation "without interference by said Hale." The suits by the petitioner, the Twin City Pipe Line Company, disregarded the solemn obligation of said company and the Industrial Oil and Gas Company to furnish the gas at ten cents, and based their alleged right of recovery upon the higher rate which had been fixed by the City Commission of the City of Fort Smith. The respondent at all times paid the amount due under the contract with Hale and insisted that the petitioners had assumed Hale's obligation to furnish the ten cent gas for the five years. The pleadings of the petitioners in that litigation (R. 77, 78, 79) show that one of the principal contentions of petitioners was the invalidity of the contract of petitioners to furnish gas at ten cents.

The petitioners at the trial introduced a table showing the quantity of gas consumed by the respondent covering the period of the Hale contract from October 30, 1925, to October 30, 1928. The difference between the price of that gas at the city rate of fifteen cents and at the contract rate between petitioners and respondent of ten cents amounts to the sum of $45,909.81. That sum is arrived at by the figures given by the general manager of the petitioners (R. 153-157). Therefore, it was worth to the petitioner, the Twin City Pipe Line Company, to destroy the Hale ten cent contract the sum of $45,909.81.

The Industrial Oil and Gas Company and S. H. Hale, and the respondent appealed from the decree. The appeal of the Industrial Oil and Gas Company raised for it the question of its obligation to pay to Hale all damages due to the respondent for the breach of the Hale contract and the liability of the Industrial Oil and Gas Company thereunder. It will, therefore, be observed that *the respondent had won its suit to establish its right to the ten cent rate and that the winning of that suit was worth the sum above named.* Evidently to get rid of that ten cent gas contract it was of interest to the Twin City Pipe Line Company to settle the case. The president of the petitioners (R. 179 and 183), therefore, prepared the contract in controversy and it was signed by all parties.

The petitioner, the Twin City Pipe Line Company, at an expense of $4,489.82 (R. 147) installed the eight inch pipe extending from the eight inch pipe on the north of the Harding plant to the ten inch pipe on the south, although the Harding Company had contended for one connection only. Therefore, by settling the litigation the respondent lost $41,419.99, which is the difference between the $45,909.81 and the cost of installing the eight inch pipe; and the petitioner, the Twin City Pipe Line Company, thereby reaped a profit of that sum of $41,419.99. Hence there is no merit in the contention that the cost of the eight inch pipe was a consideration moving from petitioner, Twin City Pipe Line Company, to the respondent.

But petitioners contend that the Twin City Pipe Line Company satisfied a judgment it recovered in

Cause 448, which judgment amounted to the sum of $17,155.46. That statement does not give the whole truth. The whole truth is that the Twin City Pipe Line Company in that suit secured a judgment against the Harding Glass Company for that amount and the Harding Glass Company secured a judgment against S. H. Hale for the same amount, and S. H. Hale secured a judgment over against the Industrial Oil and Gas Company, one of the petitioners, for the same amount. As the petitioners are in substance and effect one and the same in interest, the result is that the Twin City Pipe Line Company secured a judgment in effect against itself for the amount named, and it satisfied that judgment. Those facts furnish no consideration for that part of the contract in controversy which binds the respondent to take for all time all its gas from the Twin City Pipe Line Company.

It is, therefore, respectfully submitted that there is no merit in the contention that the clause of the contract under discussion is supported by a consideration.

POINT TWO.

THE DECISION OF THE COURT OF APPEALS DOES NOT DECIDE THE QUESTION INVOLVED IN A WAY THAT IS UNTENABLE AND IN CONFLICT WITH THE WEIGHT OF AUTHORITY.

Counsel for the petitioners, by their argument, attempt to convert this contract into a so-called "requirements" contract and then argue that all "requirements" contracts are valid. There is no more sacredness in "requirements" contracts than in any other. If a "requirements" contract violates the public policy of the state where it is made, such a contract falls be-

cause in violation of public policy, in the same manner that all other contracts in violation of public policy must fall. We have carefully examined the numerous cases cited by counsel for petitioners on pages 16 and 17 of their brief, and, in our opinion, not a single one of those cases discusses or decides adversely to the respondent the prime question here involved. Therefore, it will be necessary to notice only a very few of said cases.

Of the case of *Lone Star Gas Co.* v. *Municipal Gas Co.*, 117 Texas 331; 3 S. W. (2d) 790, counsel for the petitioners state that both companies were public utilities, and then say that the contract was held valid. An examination of the case shows that the contract was not held valid. The Texas court did not decree a specific performance of said contract. The clause in the contract giving one gas company a right to forfeit the contract was held invalid. The *ground* upon which the court decreed that the companies should continue to supply the gas *was that said companies owed a duty to the public.* The decision was therefore grounded on a duty that each company owed to the public. The court used this language:

> "Plaintiff in error's relation to these contracts, and through them to the consumers, together with its pipe line systems, and defendant in error's distributing systems, fixes its public duties and obligations in the premises, and makes active and applicable the principle of public policy that as a penalty, this right of forfeiture clause in the contracts cannot be invoked, but is unenforceable and void."

The court thereupon adopted the view of the Court of Civil Appeals, which resulted in compelling the two companies, because of a duty which they owed the public, to continue their supply of gas. The principle underlying the decision is at war with the contention of counsel for the petitioners.

Again counsel for petitioners rely upon the case of *Home Gas Co.* v. *Mannington Co-Operative Window Glass Co.*, 63 W. Va. 266; 61 S. E. 329, and claim that that case is in point. We respectfully submit that the question under consideration here was neither discussed nor decided in that case. It is also contended by counsel for petitioners that that case together with the case of *Elk Refining Co.* v. *Falling Rock Cannel Coal Co.*, 92 W. Va. 479, uphold so-called "requirements" contracts covering a gas supply. Neither of those cases, in our opinion, discusses the point under consideration and there is no West Virginia case which we have found, which changes the rule in the case of *West Virginia T. Co.* v. *Ohio River P. L. Co.*, 22 W. Va. 600.

The same counsel (Brief p. 20) also say that the case of *Albany Power & Mfg. Co.* v. *City of Albany*, 133 Ga. 375; 65 S. E. 886, presents "the same question involved in the case at bar." We have examined that case and do not find that the question here involved was discussed or decided. On the other hand, cases from Georgia elsewhere cited in this brief are to the contrary.

Counsel for petitioner also rely upon the case of *Cox, Inc.* v. *Humble Oil & Refining Co.*, (Texas) 16

S. W. (2d) 285. No question arose in that case of a public utility making an exclusive contract with one of its customers. Neither of the parties was a public utility.

It is argued by petitioners (Brief pp. 21-23) that the decision of the Court of Appeals is in direct conflict with the weight of authority "on the question of the validity of requirements contracts." It is also said that said decision announces a new doctrine applicable only to one class of requirements contracts—"the requirements contracts of a public utility." We have attempted to show that the obligations of a public utility to the public require the same service to every member of the public and that exclusive contracts between a public utility and one of its customers are condemned by the common law, and that that rule is as old as the common law itself.

It is also argued (Brief p. 22) that if such contracts are held against public policy, the customer is left free to abandon at any time the use of the investment in plant and line capacity or the development of gas producing territory. That argument attacks the soundness of the law of public policy as embodied in the common law of Arkansas and of other states. It is asserted as a part of that argument that there was a development of gas producing territory "made specially to serve" respondent. It is difficult to understand how a public service utility, like the Twin City Pipe Line Company, which made its investment in 1916 and furnished the respondent gas until the fall of 1923 *without any contract*, could claim that a public utility

of that kind had made its investment upon the theory *that every consumer of gas, as a matter of law, is compelled to take its gas from the petitioners.*. It is argued that the loss of a large customer will cripple the utility "in its ability to serve properly the general public." If the said petitioner cannot serve the general public as well as another public utility, then the other public utility, as a matter of justice to the public, is entitled to take the business. That is illustrated by the contract between the LaSalle Oil & Gas Company and the Fort Smith Light & Traction Company, which took away from the petitioner the business of the Fort Smith Light & Traction Company. Hale, through his company, was enabled to furnish the Fort Smith Light & Traction Company with gas at ten cents. By reason of that he got a ten-year contract with the Fort Smith Light & Traction Company. In the same way Hale offered to the respondent ten cent gas for five years, and thereby succeeded in taking away from the petitioner, the Twin City Pipe Line Company, the respondent, as a customer. We have found no law, under constitutions and laws like those of Arkansas, where any court has ever held that there is a legal obligation upon any customer of a public utility to take from the public utility its gas during the life of the gas field.

It is urged (Brief p. 23) that the Twin City Pipe Line Company did not agree not to sell gas to others. Being a public utility, it could not so agree. The contract is not void because the Twin City Pipe Line Company entered into an agreement, the result of which would be to cripple its business and relieve it from

any duty to the public. That is not the question. It is also urged that the respondent did not agree that it would not build other plants, and counsel refer to the agreement as applying only to "existing" plants. The word "existing" does not appear in the contract. There is a mistake in the contract as it appears at page 12 of the record. The fourth paragraph, the one on which this suit is based, as there printed has an omission. The said contract, however, appears correctly in the record at page 144 and said contract appears correctly in petitioners' brief beginning on page 4, except that that copy does not show that the contract was on the letterhead of the Twin City Pipe Line Company (see R. 12).

Counsel for petitioners also rely upon the case of *Bald Eagle Valley R. Co.* v. *Nittany Valley R. Co.*, 171 Pa. 284. The Court of Appeals as to that case said that it might be taken as a decision on the public policy of the State of Pennsylvania. We think said case is not in point for an additional reason. The Pennsylvania court, in holding the contract there involved valid, said:

> "It is not in restraint of trade, for its expressed purpose and necessary effect are to increase both trade and population."

Hence that court did not discuss or decide the question here involved. It is not believed that said case can be sound law under the authority of *United States* v. *Reading Co.*, 226 U. S. 324. It is also respectfully submitted that under the Arkansas cases and

constitution cited under Point Three, said Pennsylvania case cannot apply.

Kizer v. *Texarkana & Ft. Smith Ry. Co.*, 66 Ark. 348.

Yancey v. *Batesville Telephone Co.*, 81 Ark. 466.

We respectfully submit that the criticisms made by petitioners of the case of Coombs vs. Burk are fully answered by what we have said as to that case under Point One above.

POINT THREE.

THE DECISION OF THE COURT BELOW IS NOT IN CONFLICT WITH THE APPLICABLE LOCAL DECISIONS ON AN IMPORTANT QUESTION OF LOCAL LAW.

Section 19 of Article 2 of the Constitution of Arkansas reads:

> "Perpetuities and monopolies are contrary to the genius of a republic, and shall not be allowed."

By Section 18 of the same article of the Arkansas Constitution, the General Assembly of Arkansas is prohibited from making any grant to any citizen or class of citizens of privileges or immunities which upon the same terms shall not belong equally to all citizens. In Section 29 of the same article appears this language:

> "That everything in this article is excepted out of the general powers of the government, and shall forever remain inviolate; and that all laws contrary thereto, or to the other provisions herein contained, shall be void."

Under those provisions of the Constitution, a monopoly is not permitted to exist. Therefore, under those provisions, any contract which tends to establish a monopoly is necessarily void as against the public policy of the common law, and is also void as against those sections of the Constitution.

In the case of *Levy Ex Parte* (1884), 43 Ark. 42, after quoting that section of the Constitution, the court used this language:

> "The monopolies which in England became so odious as to excite general opposition, and infuse a detestation which has been transmitted to the free States of America, were in the nature of exclusive privileges of trade, granted to favorites or purchasers from the crown, for the enrichment of individuals, at the cost of the public. They were supported by no considerations of public good. They enabled a few to oppress the community by undue charges for goods or services."

Under this point counsel for petitioners cite four cases which, in our opinion, are against the contention of the petitioners.

In the case of *Cap F. Bourland Ice Co. v. Franklin Utilities Co.*, 180 Ark. 770, the same arguments were made to uphold the act of the General Assembly there in question that are made in counsel's brief. Act 55 of the General Assembly of Arkansas of 1929 (Acts 1929, p. 110) attempted to empower the Railroad Commission of Arkansas, by Sections 5, 16 and 17, in effect to establish a monopoly in the ice business. The Arkansas court held those sections of said act invalid because in conflict with the Constitution of Arkansas. In effect the

court held that said sections tended to establish a monopoly and that they were, therefore, in conflict with the Constitution of the State; and further held that the legislature had no power to pass any law the effect of which would be to establish a monopoly and thereby defeat competition.

Counsel also rely upon the case of *Warmack* v. *Major Stave Co.*, 132 Ark. 173. In our opinion, the principles decided by the Supreme Court of Arkansas in that case condemn the contract in controversy. In that case, the Major Stave Company brought a suit against L. M. Warmack to compel him to furnish electric lights in accordance with the terms of a contract entered into by the said company and the predecessor of said Warmack. The lower court directed the specific performance of the contract. The Supreme Court held that error, citing cases. The Supreme Court did not grant the relief because of the contract, but granted it because of a duty owing by the public utility to furnish lights to all customers under similar circumstances. A question arose as to whether the contract amounted to a payment for the lights. The parties by their contract had arranged the method of paying for the electricity. The court upheld that portion of the contract. In concluding the court said:

> "From the views we have expressed it follows that the court should not have directed the specific performance of the contract, but was correct in granting a mandatory injunction to compel Warmack to again turn on the current at the plant of the Stave Company."

The case therefore holds in effect that the public utility must serve all alike. Therefore, the public utility cannot compel an exclusive contract.

Petitioners also rely upon the case of *Fort Smith Light & Traction Co.* v. *Kelley*, 94 Ark. 461. An examination of that case will prove that said case does not support the contention of the petitioners. That case did not involve a controversy between a public utility and a *customer*. Besides, in our opinion, said case is an authority against the contention of the petitioners. Kelley and the Mansfield Gas Company were owners of gas wells and pipe lines. Kelley secured a franchise to furnish natural gas to the inhabitants of Fort Smith. The Mansfield Gas Company constructed some of the lines in Fort Smith. Then and prior thereto the Fort Smith Light & Traction Company had a franchise to manufacture and sell artificial gas in Fort Smith. It was contended by Kelley that if the contract excluded Kelley from furnishing gas in Fort Smith for forty-nine years, such provision was in restraint of trade and competition, and against public policy and unenforceable. The contract did obligate Kelley to furnish gas for the life of the franchise. *That right, however, to furnish gas was not exclusive.* It was expressly provided in that contract that if gas should be offered to the Traction Company by other parties at a lower price, the Traction Company had the right to accept such other gas. It was that provision of said contract which relieved it from being void.

The court (p. 471) stated that it was the duty of the Traction Company "as a public service corporation to furnish gas to the inhabitants of the city whose franchise it held, as cheaply as it could be obtained by the legitimate prosecution of its business. Appellant and appellees must have known that they could not enter into a contract that would be contrary to the public interests. The supplying of gas under the ordinance *was a matter of public concern*, and in contracting with each other they had to consider what would be for the benefit of the public." That decision, therefore, clearly means that the public utility and Kelley could not agree that the public utility would buy from no other seller and they could not legally agree that the price should not be reduced.

The court then considered the provision in the Kelley contract which saved it from being void as against public policy. That provision is: "That the party of the second part (Traction Company) may contract for and purchase natural gas *from other parties* or corporations, when such parties or corporations will furnish, supply and deliver the same to the party of the second part at lower figures than the said parties of the first part will do." The court held that that provision was for the benefit of the appellant. That provision prevented the contract from being an exclusive one and left the public utility free to buy its gas from any person who would offer the same cheaper. Said contract therefore contained provisions showing that, as a matter of law, it did not stifle competition. It encouraged competition. The contract protected

competition in its very terms. Kelley had the right to meet the lower prices if he so elected. The court held that he could not refuse to meet the lower prices and then declare the contract void. As between the public utility and Kelley, the contract granted to the former the exclusive right to distribute gas in the City of Fort Smith and suburbs with the express provision that if gas was offered cheaper by competitors, the utility had the right to take it.

By reason of the above provisions, the court said:

> "The contract is not one in restraint of trade. It does not restrain appellees (Kelley) from supplying natural gas to the City of Fort Smith under the ordinance No. 634, so long as they are willing to meet a 'downward revision' of the prices of natural gas. The law prohibiting contracts in restraint of trade does not prevent one from making a contract by which he agrees to compete with others in the price of the commodity which he produces for the use of the public. One purpose of the law in prohibiting contracts in restraint of trade is *to encourage competition* and thereby lower the prices of services and commodities to the public."

In answer to the contention of Kelley that the contract did not tend to lower prices, the court said:

> "But that is its inevitable *tendency*, and, indeed, *was its effect* in this case. The price of gas to the consumer has been greatly reduced since appellant entered into the contract with the Arkansas Company. Appellant could never lower the price of gas to the consumer unless by the terms of the contract it had the right to purchase gas at a lower rate than was fixed by appellees. That is precisely the right that appel-

lant has by the terms of this contract, whenever appellees fail to meet the lower prices of some other person or corporation."

The court further said:

"It was impossible for the consumer to be oppressed by a monopoly in the price of natural gas *under the terms of this contract,* for by its terms appellant's pipes were open *to every producer* who applied for admission at a *lower rate.*"

In the same case, the court further said:

"Since, under our construction of this contract there was no restraint of trade and no monopoly created injurious to the rights of the public, the cases cited in the brief of counsel for appellees, where there were contracts in restraint of trade or creating monopolies, are not in point."

The court then added:

"No authority can be found, we believe, construing a contract similar to this one as against public policy and void."

It is therefore clear that the court construed the contract as favoring competition and not as stifling competition. All that was said by the court after so holding, with reference to the partial restraint, was wholly *obiter* and inapplicable.

Outside of the Kelley case, just discussed, the cases from Arkansas relied upon by petitioners are cases generally where a business or profession was sold, the contract containing an obligation that the seller would not within a reasonable time enter upon the same business. It is unnecessary to take time to answer those cases, since they have no application.

It is argued (Brief p. 32) that the Supreme Court has held that a monopoly may be granted to a public utility. Said court has not so held. Said court, however, has held that an exclusive franchise may be granted to a public utility. However, in the case of *Citizens Pipe Line Company* v. *Twin City Pipe Line Company* (the latter being the petitioner in this case), 178 Ark. 309, the said Supreme Court specifically held that the petitioner in this case had no exclusive franchise. In substance, the argument of petitioners on this point amounts to a contention that the right to grant an exclusive franchise to a public utility authorizes the public utility to demand of its customers exclusive contracts. We have found no decision so holding. The said argument of petitioners is based upon the assumption that the contract in controversy does not tend to create a monopoly. If a public utility has the right and power to make such an exclusive contract with a customer, then necessarily it would follow that said public utility may demand that condition be included in all its contracts. The inclusion of that clause in a substantial number of its contracts, or even in one in case of a large consumer, excludes the possibility of any competition from outside competitive companies. The evidence tends to show that the gas supply in and around Fort Smith has continually increased ever since the time when the Kelley case, above discussed, arose. If such contracts are valid, then the people of Fort Smith would get no benefit from the discovery of new enormous gas fields at the very door of the community. No matter how much gas a

new company would offer nor at what low price it would be offered, no customer could take gas from the new company if such a contract is valid. It is therefore clear that the contract in controversy does tend to create a monopoly, and hence, under the public policy of Arkansas, is illegal and void.

We have found no law from any jurisdiction which holds that a large manufacturing concern, like the respondent, when confronted with the gas shortgage and the raise of gas prices, has not the constitutional right to use its own efforts to secure a full gas supply in order that it may live. The fallacy of petitioners' contention is made clearer by reference to what is said on page 35 in these words: "Financial considerations, if nothing else, would prevent the utility from developing or contracting for a supply of gas far in advance of present needs, when its large customers could quit it at will." The law, therefore, compels the customer to take? We submit that that doctrine is not found in any adjudicated case. Every public utility in entering upon its business well knows that its customers may take service or they may decline service. They may take service when they will and they may refuse to take service when they wish. The rule contended for by the petitioners in that quotation would make all customers of every public utility the slaves of the public utility.

Counsel urge (Brief p. 36) that respondent, having secured the benefit of the contract in controversy, decided to take its own gas from its own subsidiaries. Counsel overlook the actual facts. The only real bene-

fit received by the respondent under the contract was the construction of the eight-inch pipe. That eight-inch pipe was a benefit to the Twin City Pipe Line Company also. The Twin City Pipe Line Company owed a duty to the respondent to provide sufficient service pipes to give the respondent its gas needs. The District Court in its first opinion in 488 (R. 129) intimated that that relief might have been granted, had the gas supply not been too short. In addition, the construction of that pipe, in the loss of ten cent rate on gas, cost the respondent $45,909.81 and resulted in a clear profit to the Twin City Pipe Line Company of $41,419.99.

In addition to the Constitution and decisions of the Arkansas court above referred to, as showing the public policy of that state—that no monopoly will be tolerated, reference is made to Crawford & Moses' Digest, Sections 7368 to 7373, being the anti-trust law of Arkansas.

In the case of *Woodruff* v. *Berry,* 40 Ark. 252, a case cited by this court in *Gibbs* v. *Consolidated Gas Co.,* 130 U. S. 396, it was held that an agreement between bidders for the job of public printing *which tended to stifle competition,* was illegal and void.

In *Hanauer* v. *Gray,* 25 Ark. 350, the Arkansas court held that a contract based upon Confederate money was void as against public policy.

In *Lindsey* v. *Rottaken,* 32 Ark. 619, a case involving the right of the City of Little Rock to issue warrants, the court held that any transaction against public policy was void, saying:

> "So a contract invading any one of the other interests which the law cherishes, though the thing to be done or promoted is not indictable, and not prohibited by any statute, termed a contract against public policy is likewise void."

In the case of *Patterson* v. *Rogers*, 148 Ark. 222, the Supreme Court of Arkansas upheld a contract between private parties, but the court recognized the principle that if the contract tended to create a monopoly, it would be void, saying:

> "Contracts in partial restraint of trade will be upheld *unless they result in the creation of a monopoly*" (italics ours).

The following cases also support the contention that any contract in violation of public policy is void:

Jeffrey v. *Ficklin*, 3 Ark. 227.
Horn v. *Foster*, 19 Ark. 346.
Edwards v. *Randle*, 63 Ark. 318.
St. L., I. M. & S. Ry. Co. v. *Matthews*, 64 Ark. 398.
Kizer v. *Texarkana & Fort Smith Ry. Co.*, 66 Ark. 348.

In the Matthews case above, the court held that a contract between a locomotive engineer and a railroad company for perpetual employment of the engineer was against public policy and void.

In *Tallman* v. *Lewis*, 124 Ark. 6, a contract between a board of improvement and a member of the board was held void as against public policy.

It is submitted that the following cases on this point support the contention of the respondent:

Judd v. *Harrington*, 139 N. Y. 105.
People v. *Sheldon*, 66 Hun. 590.

Nester v. *Continental Brewing Co.*, 161 Pa. St. 473.
Morris' Run Coal Co. v. *Barkley Coal Co.*, 68 Pa. St. 173.
Chicago Gas Light Co. v. *Peoples Gas Light Co.*, 121 Ill. 530.
Western Union Telegraph Co. v. *American Union Telegraph Co.*, 65 Ga. 160.

ADDITIONAL SUGGESTIONS AS TO THE CONTRACT.

In addition to the above, we respectfully suggest that the contract, which is found on page 4 of petitioners' brief, does not obligate either petitioner to deliver any quantity of gas whatever. The contract was drawn by the president of the petitioners. It expressly provides that the consideration is the undertakings and agreements "*hereinafter set out,*" That language precludes the existence of an obligation by *implication.* Said contract, being drawn by the petitioners, must be more strongly construed against them.

Marley v. *Hackler*, 176 Ark. 238.

The Court of Appeals decided the contract on one point only. We think that point is determinative of the rights of the parties hereto. Nevertheless, we feel it our duty to make the suggestion now made. Even if the contract was valid, which we deny, the petitioners could not recover for lack of consideration, and lack of mutuality of obligation as well as remedy.

While we have every confidence in the invalidity of the contract, yet we deem it a duty to suggest to the court that, if the court should be of the opinion that we were mistaken in that respect, then the case would be

one wherein the Court of Appeals had rendered a correct decision, although it had given therefor the wrong reason. Without comment on this suggestion, we submit the following:

Electric Management Corp. v. *United Power Co.*, 19 Fed. (2d) 311.

Pomeroy on Specific Performance, 3rd Ed., Sec. 165.

Hine Co. v. *Bertaut Co.*, 9 Fed. (2d) 191.

Cold Blast Transportation Co. v. *Kansas City Nut Co.*, (C. C. A. 8), 114 Fed. 77.

Walker v. *Swift*, (C. C. A. 5), 200 Fed. 529.

Arizona Edison Co. v. *Southern Sierras Power Co.*, (C. C. A. 9), 17 Fed. (2d) 739.

Nakdimen v. *Atkinson Improvement Co.*, 149 Ark. 448.

Marble Co. v. *Ripley*, 10 Wall. 339.

Engemoen v. *Rea*, (C. C. A. 8), 26 Fed. (2d) 576.

Wyman on Public Service Corporations, Sec. 331.

CONCLUSION.

The petitioners in the "Conclusion" of their brief attack the moral right of the respondent to assert the illegality of the contract. It is difficult to understand the moral basis of petitioners' action in that respect. The petitioners in their pleading in case 448, although admitting that they had solemnly assumed the obligations of the Hale contract, yet contended that the same was void; and the Twin City Pipe Line Company, a public utility, succeeded in having the District Court in that case decree that said petitioner, though it had assumed the contract, was not bound thereby.

This court has often held that contracts void as against public policy are struck down, not for the benefit of either party, but for the benefit of the public.

> "In such cases there can be no waiver. The defense is allowed not for the sake of the defendant, but of the law itself. The principle is indispensable to the purity of its administration. It will not enforce what it has forbidden and denounced."
>
> *Oscanyan* v. *W. R. Arms Co.*, 103 U. S. 261.

It is therefore respectfully submitted that the cause should be affirmed.

JOSEPH R. BROWN,
JAMES B. McDONOUGH,
Counsel for Respondent.

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No. 330

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930

TWIN CITY PIPE LINE COMPANY

and

INDUSTRIAL OIL & GAS COMPANY,
PETITIONERS,

vs.

HARDING GLASS COMPANY,
RESPONDENT

MOTION OF RESPONDENT FOR LEAVE TO CALL THIS COURT'S ATTENTION TO A MISTAKE OF PETITIONERS' COUNSEL MADE IN THE ORAL ARGUMENT

JOSEPH R. BROWN,
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Counsel for Respondent.

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Comes the respondent, by its counsel, and by permission of the Court suggests:

Counsel for the petitioners, in his oral argument before this Court, claimed that there was evidence in this record tending to prove that the petitioners had ex-

pended, by reason of this contract, large sum of money in the development of gas *for the respondent.*

Respondent contends that there is no evidence to support that contention.

THE RECORD

The petitioners in their complaint (R. 6) did allege that the Twin City Pipe Line Company, in order adequately to supply the Harding Glass Company with gas, had caused the Industrial Oil & Gas Company to expend in excess of $64,000.00. That allegation was specifically denied in the answer of the respondent (R. 17). It is the respondent's contention that petitioners offered no evidence to support said allegation. Petitioners' only witness (R. 154-155) did testify that nineteen new wells had been drilled and gave the dates and cost of these wells (R. 155), *but seven of these wells* (R. 155) *were drilled before the contract,* and said witness nowhere stated that the said nineteen wells were drilled *for the Harding Glass Company under this contract;* but, on the contrary, said evidence (R. 155) shows that said Industrial Oil & Gas Company expended nearly as much money in drilling wells *in the eight months preceding the contract* as it did *in the two years and four months following said contract.* See figures on page 155. Petitioners made no effort to show the relative or comparative amounts of gas consumed by other industries, factories, and the general public. There is not a scintilla of evidence in the record *to show that the expense of development was any greater because of the existence of this contract.*

Besides, the development was made by the Industrial Oil & Gas Company, and the contract in controversy did not obligate that company to make any development whatever *for the Harding Glass Company.*

The respondent respectfully prays that the above suggestions be considered and hereby agrees that petitioners may make any desired response hereto.

Respectfully submitted,

JOSEPH R. BROWN,
JAMES B. MCDONOUGH,
Counsel for Respondent.

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TWIN CITY PIPE LINE COMPANY AND INDUSTRIAL OIL & GAS COMPANY, PETITIONERS,

VS.

HARDING GLASS COMPANY, RESPONDENT.

PETITION OF RESPONDENT FOR A REHEARING.

JOSEPH R. BROWN,
JAMES B. McDONOUGH,
Counsel for Respondent.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930.

No. 330.

TWIN CITY PIPE LINE COMPANY AND INDUSTRIAL OIL & GAS COMPANY, PETITIONERS,

VS.

HARDING GLASS COMPANY, RESPONDENT.

PETITION OF RESPONDENT FOR A REHEARING.

Comes now the above named respondent, the Harding Glass Company, and presents this its petition for rehearing of the above entitled cause, and in support thereof respectfully shows:

The sole question decided by the Court of Appeals was that a contract between a public utility and its customer, obligating the latter to take all its requirements from the former, was in restraint of trade, against the public policy of Arkansas, and void. That is the sole question presented to this Court by petitioners.

Such a contract tends to create a monopoly and to stifle competition. That as a matter of law appears on the face of this contract itself. The rule is universal that, when the contract on its face shows that its tendency is to create a monopoly or to stifle competition, it is void as a matter of law, and no evidence will then be considered to show its validity or invalidity. Evidence is admissible in such cases only when the contract is valid on its face. In offering testimony, the petitioners assumed that the contract was valid on its face. The respondent objected during the trial to substantially all of the evidence, contending, as alleged in its answer, that the contract was void on its face. The respondent, by cross examination of petitioners' witness, and independently of that, offered testimony tending to show that the contract was a part of the plan to create a monopoly. As shown below, the District Court excluded, on objection of petitioners, important evidence to establish respondent's contention on that point.

We respectfully, but earnestly, contend that this Court in the opinion has not discussed or decided the sole question above named.

Since the opinion in this cause was handed down, we have carefully re-investigated the validity of an exclusive contract between a public utility and a customer, and we have found the rule to be universal that no restraint whatever, however slight, can be tolerated in contracts between a public utility and a customer. We find no dissent from that rule either in America or England.

If the opinion stands, the result is the annulment of the Constitution and statutes of Arkansas upon the points under consideration. We therefore submit that the case involves a problem of judicial power over the Constitution and laws of a state deciding principles no less important than those involved in *Marbury* v. *Madison* and *Gibbons* v. *Ogden*. We therefore request this Court's indulgence on the length of this petition.

Before suggesting the reasons supporting our views, we request permission of the Court to call attention to the peculiar situation in this case. The respondent in its appeal to the Court of Appeals from the District Court relied upon four controlling questions:

> (a) The contract was void on its face, because it tended to create a monopoly and stifle competition, and was therefore against public policy.
>
> (b) Said contract was unenforceable because of lack of mutuality of obligation and remedy, there being no obligation on the part of either petitioner to furnish any gas whatever to respondent, the contract merely giving the right to furnish gas if the Twin City Pipe Line Company "can."
>
> (c) Specific performance of said contract could not be compelled against *petitioners* because it would require a court of equity to employ geologists to determine the drilling and other scientific and business matters.
>
> (d) The said contract could not be specifically performed because it was too indefinite in time and too uncertain to be capable of specific performance.

The Court of Appeals decided the first question in favor of respondent. Petitioners brought the case to this Court for review. Respondent's brief suggested the other questions. If the contract is valid, petitioners, because of reasons above given, are not entitled to specific performance. Is not respondent, therefore, entitled to have the other questions decided? Should not the petition for rehearing be granted, and the cause restored to the docket for reargument and determination on all questions involved? The public policy of a state is a matter wholly within the exclusive power and jurisdiction of a state.

Northwestern Mutual Life Ins. Co. v. *Johnson*, 254 U. S. 96.

Whitfield v. *Aetna Life Ins. Co.*, 205 U. S. 489.

Therefore, the petition for certiorari should be dismissed.

The respondent was not the largest consumer of gas in Fort Smith. The Fort Smith Light & Traction Company used at least 4,000,000 cubic feet per day, and there were 10,000 customers in Fort Smith and Van Buren (R. 124, 126, 138). There is no evidence to show that there was any special development made by reason of this contract (R. 6, 17, 154, 155).

The Twin City, by getting rid of the ten cent gas, received $45,409.83, and deducting the $4,489.92 left it a net profit of $41,519.91. The superintendent of petitioners contended that the eight inch pipe line was of no benefit. However, the facts which he stated showed that it was a benefit (R. 156, 158, 185, 186).

POINTS.

I.

The highest principles of justice forbid petitioners from succeeding in this Court on the ground (which is the foundation of this Court's opinion) that "it is not shown that this contract was made as a part of a plan to create a monopoly or restrain trade," because petitioners, in the trial of this case in the District Court, by their objections (R. 176) secured from said District Court the exclusion of important evidence tending to prove that said contract was a part of said plan, and thus secured a declaration of law from said District Court, which is the foundation of said District Court's decree, that evidence of that nature was immaterial (R. 174-177).

In proving an intent to create a monopoly or restrain trade, a wide range of evidence is admissible, and a fact seemingly unimportant when standing alone, is controlling when considered with other evidence. Authorities on the proposition are unnecessary. There is ample evidence to establish that said exclusive contract was required of the customer for the purpose of securing a monopoly and preventing competition, but as to that only a suggestion can be made.

The truth is, three interests developed the great gas field involved. These interests were active competitors. Respondent is a large consumer, but is only one of numerous customers, there being more than ten thousand, and one using more than four times the gas used by respondent (R. 136, 138). After 1925 gas development was rapid. Hale had acquired two competing interests. He took from petitioners two of their

best customers—respondent and the Fort Smith Light & Traction Company. The latter company required 4,000,000 cubic feet per day (R. 136), more than four times the amount required by respondent (therefore, respondent was not the largest consumer, as suggested in the Court's opinion). Petitioners made a deal for the Poteau, Oklahoma, gas field, whereby that supply would not compete. After Hale sold his competing corporations to petitioners, he developed a great gas field at Gans, Oklahoma, twenty miles west of Fort Smith. The only outstanding supply of gas, other than that owned by the Citizens Gas Company, a subsidiary of respondent, was gas owned by G. T. Cazort. Soon after Hale sold to petitioners, the latter secured an extended contract on the Cazort gas. Immediately, petitioners ceased to fulfill the Hale contract with respondent. The motive is too obvious for discussion. See petitioners' letter of January 24, 1925 (R. 220), written four days after petitioners completed their control of all gas, except the Gans gas and that of the Citizens Gas Company. Hale then, under the name of the Border Gas Company, secured a franchise to furnish natural gas in Fort Smith (R. 200). The next move was to kill possible competition from the Gans gas.

With the above recital of facts tending to show the contract in question was intended as part of a plan to create a monopoly, we invite the Court's attention to respondent's further efforts to show reasons for the purchase of the Gans gas by petitioners. That transaction was carried on between Hale, who acted for owners of the Gans gas, and Thompson Ross. The rela-

tion of Ross to petitioners is not shown, but the evidence shows Ross acted for petitioners.

Respondent's further efforts to bring out all testimony tending to show the monopolistic scheme appear at page 175 of the record:

"Q. That contract is signed by what companies?
"A. Signed by an individual and Mr. Hale as an individual. Two individuals acted in the purchase of that property, S. H. Hale and Thompson Ross.
"Q. The gas in Oklahoma was not owned individually by Mr. Hale?
"A. Mr. Hale acted in the deal to sell those properties over there.
"Q. Do you know whether the title to those properties was in Mr. Hale or in some corporation?
"A. Two corporations in which he owned all the stock.
"Q. In other words, he controlled it like he controlled the companies over here?
"A. Yes, sir.
"Q. You saw that contract I believe you say?
"A. Yes, sir.
"Q. Did the two corporations that owned the wells in Oklahoma join in that contract?
"A. Mr. Hale contracted with Mr. Ross to make delivery of certain properties belonging to certain corporations, which was afterwards done.
"Q. Then the corporations in Oklahoma did not sign the contract?
"A. My recollection it was a contract between the two individuals.
"Q. Was the Industrial Oil & Gas Company a party to that contract?
"A. No, sir, in no way.
"Q. I would like to ask you to produce a copy of that contract. You can take time to do it.
"A. I don't know if that contract will be available to me in any way.

"Mr. Miles: We have no objection. The contract fixes whether it was a sale for all the stock in those corporations. The contract of sale of those properties was a transfer of one hundred per cent of stock from one man to another. The corporations did not sign. Now if the Court rules it is necessary to get that contract we will get it but we will have to delay the case.

"The Court: The point is, do you object?

"Mr. Miles: We object.

"The Court: On what ground do you claim you are entitled to it?

"Mr. McDonough: It is on the ground that it throws light upon this transaction, our theory being that the purpose of all these deals is to secure a monopoly of the gas.

"The Court: Do you make that a defense in your answer?

"Mr. McDonough: Yes, sir.

"The Court: How can that be a defense to this contract?

"Mr. McDonough: *It is that the contract is carrying out the monopoly and in restraint of trade and is void because against piblic policy. That is my theory of it. If the evidence shows, as we think it will if we can get it all, that the purpose of all these contracts is to maintain an absolute unyielding monopoly over the gas that goes to this community, then it is in restraint of trade, this contract being a link in that chain.*

"The Court: The objection will be sustained."

The purpose of the evidence offered is stated by respondent's counsel (R. 176). It was to prove the plan to create a monopoly, and that the contract was a part of that plan. The District Court held the evidence inadmissible. The District Court held that evidence showing the contract was a part of the plan to monopolize the gas *constituted no defense.* This Court in the

opinion holds such evidence constitutes a defense. Yet, this Court is about to affirm the District Court's decision, which precluded respondent from making the proof, and making further efforts to offer additional proof.

Petitioners' counsel (Brief p. 12), referring to the contract, assert "that it was not part or parcel of any scheme by which the utility sought to tie up industries generally in order to avoid competition." This Court adopted that theory of the case inadvertently overlooking the above record, as we believe. In adopting that theory, this Court said: "And it is not shown that this contract was made as a part of a plan to create a monopoly or restrain trade . . ."

It is our contention that said cause should not be reversed. If, however, the Court should think otherwise and reverse it, we truly believe some provision should be made to permit respondent to make its offer of proof good, and show that this contract was a part of the plan of monopoly.

II.

Error of the Court as to Burden of Proof.

The Court's opinion is based upon the assumption that the contract is valid upon its face. As the rule is universal that no public utility can make an exclusive contract with a customer, it follows that this contract is void upon its face. The cases elsewhere herein cited so hold, and we have found no decision to the contrary. This rule of law is made clear by Williston on Contracts in his chapter on illegal agree-

ments, and especially at Sections 1645, 1651 and 1753. In the trial of this case, therefore, respondent was not required to introduce any proof whatever to defeat the enforcement of this contract. If the contract is valid upon its face, the burden would be upon the respondent; otherwise not.

Elliott on Contracts, Sec. 4676, and cases.
13 Corpus Juris, p. 761, and cases cited in notes 88, 89.

Therefore, as a matter of law, there can be no decision against respondent (as indicated in the Court's opinion) on the ground that it was not shown that the contract was part of a plan to create a monopoly; nor can it be held that the respondent "has failed to show that the contract has any tendency to injure the public." On the latter point the contract shows on its face, as a matter of law, that it does injure the public.

In *Mitchell* v. *Reynolds*, 1 Peere Williams 180 (190), the court said:

> "In all restraints of trade, where nothing more appears, the law presumes them bad."

The Arkansas court has universally held that any contract whose tendency is to stifle competition is void. That the present contract stifles competition is certain.

Horner v. *Graves*, 7 Bing. 735 (743).
Elliott on Contracts, Secs. 651 and 758.
United States v. *Addyston Pipe Line Co.*, 85 Fed. 271; 175 U. S. 211.

III.

The question presented to this Court in the petition for certiorari, in the brief thereon, and in petitioners' brief on the merits (see latter brief p. 2), was whether, under the Arkansas Constitution, and laws, and the decisions of the courts of that state, an exclusive contract between a public utility and a customer was void as in restraint of trade and against public policy, and therefore void.

The petition of petitioners and briefs thereon show that that was the sole question presented. See also page 10 of petitioners' brief on the merits. Counsel for the respondent respectfully submit that this Court has not discussed or decided that exact question.

The public utility owes the *duty* already to supply the customer with gas. Said public utility cannot, therefore, bind a customer to take exclusively from it. *The reason is that such a contract prohibits any other gas producing, gas transportation, or gas selling company from developing the great resources of gas that underlie the ground in that community.* Such a contract precludes the incoming of any rival because all customers are bound hand and foot to the petitioners by this exclusive feudal contract, and consequently the petitioners *by the contract* are granted a monopoly without the consent of the governing municipality, and without complying with Arkansas statutes whereby exclusive franchises may be granted; and therefore petitioners obtain rights and privileges of an exclusive franchise without the burdens of complying with Arkansas law; and in the very teeth of that law deprive the municipality of its statutory control (see Acts

1921, pp. 199-200, and C. & M. Dig., Secs. 5448 and 7492) by such exclusive contracts.

All authorities in English and American Jurisprudence, without dissent so far as our search has gone, hold *partial restraint of trade, however slight, will not be tolerated in any contract between a public utility and a customer.* In *Gibbs* v. *Consolidated Gas Co.,* 130 U. S. 396, the contract on which Gibbs sought to recover, had the effect of destroying competition, *although there existed in Maryland ample regulatory power.* Does the Arkansas Constitution exempt from its provisions communities which have regulatory bodies to control rates? An exclusive franchise "for a reasonable time," is not a monopoly and does not stifle competition, but an exclusive contract for all time or the life of the gas field, which may be a hundred years, kills competition.

The following authorities support the view that no restraint, *however partial,* will be upheld *in any contract* between a customer and a public utility:

Wyman on Public Service Corporations, Secs. 681, 685.

Pond on Public Utilities, Secs. 205, 207, and cases there cited.

Reeves v. *Decorah Farmers' Cooperative Society,* 160 Iowa 194.

W. W. Montague & Co. v. *Lowry,* 193 U. S. 38.

Anderson v. *Jett,* 89 Ky. 375.

Chapin v. *Brown Bros.,* 83 Iowa 156.

Boutwell v. *Marr,* 71 Vt. 1.

13 Corpus Juris, p. 480, Sec. 423.

Barrow v. *McMurtry Mfg. Co.,* 54 Colo. 432.

Anderson v. *Shawnee Compress Co.*, 17 Okla. 231.
19 R. C. L, 36.
Joyce on Monopolies, Sec. 92, pp. 119 and 120.
Sampliner v. *Motion Picture Patent Co.*, 255 Fed. 242.
Coombs v. *Burk*, 40 Cal. App. 8; 180 Pac. 59.
Elliott on Contracts and New Supplement, Sec. 817.
Arnold v. *Jones Cotton Co.*, (Ala.) 12 L. R. A. (N. S.) 150, and note.
Chicago, I. & L. Ry. Co. v. *Southern Ind. Ry. Co.*; (Ind.) 70 N. E. 843.
Williston on Contracts, Sec. 1645.
Santa Clara Valley Mill & Lumber Co. v. *Hayes*, 76 Cal. 387.
Shasta County v. *Moody*, (Cal.) 265 Pac. 1032.
Tuscaloosa Ice Mfg. Co. v. *Williams*, 127 Ala. 110.

In Williston on Contracts, Section 1651, appears this language:

> "Public service companies are more strictly limited than others in entering into contracts in restraint of trade, because of their duty to give equal service to the public. They can make no contracts inimical to that duty."

The right of private contract must yield "to the exigencies of public welfare."

Union Dry Goods Co. v. *Ga. Pub. Ser. Corp.*, 248 U. S. 372.

Exclusive Contracts in Arkansas Between a Gas Public Utility and Its Customers Conflict With Act 124 of 1921. See Acts 1921, pp. 199-200.

The Arkansas Legislature, in the passage of that act, was without power to substitute regulation for

competition. Said act is exceedingly broad. It does not, and could not, destroy the established rule by common law and the Constitution of Arkansas that any contract which tends to stifle competition is void. Said act includes "all matters pertaining to the regulation and operation * * * of every gas company furnishing gas for domestic or industrial purposes." That act in effect prohibits the making of any exclusive contract with a customer by the gas company, because:

If a gas company may make an exclusive contract with one customer, it may make such contract with all customers. If such gas company has the power to make such an exclusive contract with all members of the public, necessarily it would have the right to demand that exclusive contract as a condition for furnishing the service. Necessarily, the existence of such a power to make such exclusive contracts grants to the public utility at least *a part of the control which the act imposes upon the municipality.* If a public utility can make exclusive contracts with every customer, the municipality would legally have but little control over the public utility.

There is no Arkansas decision which holds that regulated monopoly is better than competition. Until Arkansas changes its Constitution, such contracts must be held void. Regulation alone is insufficient to protect the public. It is easy for a regulated gas monopoly to permit its development to lag, to permit a slow down in its service, to permit excessive salaries to overhead officials, to plead a scarcity of gas, and to offer a thousand other excuses for an increase in price. Being

a monopoly, it does not fear competition; and being in possession of all the facts, it may easily defeat any effort of the regulatory body to prevent a wrongful increase of rates. Besides, increase in prices is not the only evil of a monopoly. It may reduce its service and do many other things injurious to the public.

In *Mitchell* v. *Reynolds,* 1 Peere Williams, 180 (190), more than two hundred years ago, an English Court suggested this danger, referring to "corporations who are perpetually labouring for exclusive advantages in trade and to reduce it into as few hands as possible." See Williston on Contracts, Sections 1635, 1645 and 1651.

The theory of the beneficial monopoly displacing competition breaks down when the monopolist, by means of contracts such as this, can prevent the further development of natural resources. Is it not clear that the "presumably just" rates the gas company will be permitted to charge will be based upon the amount of gas made available by it in proportion to its investment? Is it not equally clear that if it is permitted to control its customers by contracts such as this, it will never develop a supply of gas sufficient to cause it to lower its rates? This record shows one increase since this contract and even since this suit was brought (R. 216). The petitioner, the Twin City Pipe Line Company, merely notified the regulatory body that it would increase its rates (R. 216) and did so. Is it not equally clear that no rate-fixing or regulatory body on earth can compel the gas company to open new fields and new supplies? It is true that

the public, nor the legislature, nor the regulatory body may realize the injury to the public, but the injury is there enriching the monopolist at the expense of the public.

Is it not true also that the enforcement of such exclusive contracts between customer and public utility can find no justification in a supposed necessity of protecting the utility or the public from unregulated and theoretically ruinous competition? This ruinous contract affects, injuriously to the public, the gas supply as well as the transportation and sale. The petitioners own the rival transportation lines and the rival distribution systems, and if they are permitted to make these exclusive contracts with their customers, the monopoly is complete in violation of the Arkansas Constitution.

The Supreme Court of Arkansas Specifically Denied the Monopoly Which Petitioners Seek to Establish By Enforcing This Contract.

In addition, the petitioners have proved in this record that the Supreme Court of Arkansas specifically denied the exclusive monopolistic right which petitioners are endeavoring to enforce in this lawsuit. Said petitioners introduced in evidence the pleadings (R. 190-202) and the opinion of the Supreme Court of Arkansas (R. 203-211) in the case of the petitioner, the Twin City Pipe Line Company, against Citizens Pipe Line Company, latter being the owner of a pipe line transporting gas for the respondent from the gas fields of Oklahoma to the Harding glass plant in the

State of Arkansas. That case is reported in 178 Ark. 309.

The petitioner in that case made an assault upon the right of the Citizens Gas Company and the Citizens Pipe Line Company to pipe gas through the streets of Fort Smith to the Harding glass plant. It was charged by the defendant in that case that the Twin City Pipe Line Company had wrongfully brought that suit in order to establish an unlawful monopoly. It was contended in that case that the granting of a franchise to the Citizens Pipe Line Company interfered with the rights of the Twin City Pipe Line Company. The Supreme Court of Arkansas decided against all the contentions of the petitioner, the Twin City Pipe Line Company. The State granted the franchise to the Citizens Pipe Line Company and thereby declared that that company had a right to transport gas through the streets of Fort Smith for the purpose of supplying the needs of the Harding Glass Company. The decision by the Supreme Court of Arkansas in that case is in effect a judicial declaration that the petitioner is not entitled to a monopoly. The Court upheld the franchise, and the franchise granted the right.

IV.

The Arkansas Court has held consistently from the foundation of the Court that every contract whose tendency is to create a monopoly or stifle competition is void.

This principle was clearly declared by the Supreme Court of Arkansas in *Patterson* v. *Rogers*, 148 Ark. 222, in the following language:

> "This court has in more than one case upheld contracts in partial restraint of trade; *but in doing so we have recognized that the contract is of such character that the rights of the public may be involved; and where the contract results in the creation of a monopoly, it is void as contrary to public policy.*"

In support of that the Court cited *Wakenight* v. *Spear,* 147 Ark. 342; and *Shapard* v. *Lesser,* 127 Ark. 590.

The evil condemned in *Shapard* v. *Lesser* was that of an agreement between two parties to suppress competition. The Arkansas Court ruled the same way in the case of *Woodruff* v. *Berry,* 40 Ark. 252, citing the decision of this Court in *Gibbs* v. *Consolidated Gas Company,* 130 U. S. 396. The evil condemned by this Court in that case was the provision in the contract dividing the territory between public utilities. This Court held that the effect of that was to destroy competition.

The Arkansas Court has decided many cases as indicated in *Patterson* v. *Rogers,* wherein it held that a partial restraint of trade between private individuals did not make the contract invalid. The Arkansas Court, however, has never held that any contract which tends to create a monopoly is valid. It has always held that any contract which tends to create a monopoly or stifle competition is contrary to the genius of a republic and shall not be.

The Arkansas Decisions Are Conclusive.

In our opinion, the principle involved is decided by the three Arkansas cases above referred to. We deem

it our duty, however, to call this Court's attention to other Arkansas cases, for the reason that if we are right that the Arkansas Court has decided the principle holding this contract invalid on its face, as a matter of law those decisions necessarily lead to the affirmance of this case.

In the case of *Clear Creek Oil & Gas Co.* v. *Fort Smith Spelter Co.*, 148 Ark. 260, a question arose as to the validity of a contract between the appellant in that case, which is the same corporation referred to in the record in this case, and a customer as to the validity of a contract between a customer and a public utility. The counsel for the customer in that case were the same as counsel for the petitioners in the present case. On pages 264 of the report in that case, the Court in discussing the question of the validity or invalidity of a contract between a public utility and a customer, said:

> "Learned counsel for appellees candidly concede that, if appellant was organized as a public service corporation and at the time of the execution of these contracts it was operating as such public utility in the production and distribution of gas, the contracts were void, so far as they undertook to confer special privileges upon appellees. . . ."

That case finally came to this Court (*Fort Smith Spelter Co.* v. *Clear Creek Oil & Gas Co.*, 267 U. S. 231), but this Court did not discuss that question.

In the case of *Culp Bros. Piano Co.* v. *Moore*, 162 Ark. 292, the Arkansas Court approved an instruction, which instruction made the distinction between a

contract made in the purchase of a business with a reasonable restraint to protect the purchaser and a contract the effect of which was to stifle competition.

In the case of *Cox* v. *Donnelly*, 34 Ark. 762, a question arose as to the public policy of Arkansas in a case where parties had dealt with public lands. The case is based upon the theory that any contract which is in contravention of *public policy* is void. The Court in that case used this language:

> "And it is a proposition admitting of no exception, that contracts in violation of law *or against public policy* are void, and courts will not lend their aid to enforce them."

In the case of *Paul, Admr.* v. *Stuckey*, 126 Ark. 389, the Arkansas Court defined public policy. The exact question here involved, however, was not involved there; but the Court did refer with approval to the case of *Woodruff* v. *Berry*, 40 Ark. 251, for a correct definition of public policy. In the Woodruff case, the Arkansas Court adopted the views of this Court as to the invalidity of any contract which tended to establish a monopoly or to stifle competition, in the case of *Gibbs* v. *Consolidated Gas Co.*, 130 U. S. 396.

In the case of *Edwards* v. *Randle*, 63 Ark. 318, the Arkansas Court again declared the law to be that any contract against public policy was void.

The following cases support the principle:

Schaap v. *Robinson*, 133 Ark. 113.
Bourland v. *First National Bank Building*, 152 Ark. 139 (149).

Carter v. *Bradley County Road Improvement Dist.*, 155 Ark. 288 (298).
Edgar Lumber Co. v. *Cornie Stave Co.*, 95 Ark. 449 (454).
Mendel v. *Davies*, 46 Ark. 420 (422).

It is our contention that the exact question involved here came before the Supreme Court of Arkansas in the case of *Shapard* v. *Lesser*. That was a contract to stay out of business. The Court held that it tended *to stifle competition*, and was therefore a detriment to the public and was void. Among other authorities cited by the Arkansas Court on the point appear 6 R. C. L., Section 196, page 791, and Page on Contracts, Section 434, page 685. The case of *Shapard* v. *Lesser* is annotated in 3 A. L. R. 247, with an annotation beginning at page 250.

In the case of *Wakenight* v. *Spear*, 147 Ark. 342, the Arkansas Court again noticed the distinction in the case of contracts between private parties in partial restraint of trade and other contracts which were against public policy. The Court referred to the case of *Shapard* v. *Lesser* with approval and used this language, which applies here:

> "In other words, our holding was that it was contrary to public policy for two parties to make a contract whereby one might have a monopoly."

V.

The Contract Is Void Because It Lacks Mutuality.

This Court did not discuss that question at all. That was the second question, as is shown by the assignment of errors (R. 247) presented to the Court

of Appeals. As that Court decided the first question in favor of the respondent, we assume that said Court did not deem it necessary to discuss any other proposition.

Since this Court, in the opinion, holds that the contract is valid under the public policy doctrine, the question necessarily arises whether said contract is mutually enforceable. We made that suggestion in our brief on the merits. See page 52 thereof. It is submitted that the following authorities support respondent's contention on that point:

Pomeroy on Specific Performance, (Third Edition) Sec. 165.
Electric Management Corporation v. *United Power Co.*, 19 Fed. (2d) 311.
Heckinger v. *Dinkler Hotel Co.*, (Ga.) 132 S. E. 113.
Hind v. *Bertaut Company*, 9 Fed. (2d) 191.
Cold Blast Transportation Co. v. *K. C. Nut Co.*, 114 Fed. 77.
McGown v. *Camp Co.*, 68 So. 263.

There is absolutely no obligation on the Twin City Pipe Line Company or the Industrial Oil & Gas Company to furnish any gas whatever. When the contract says "so long as the Twin City Pipe Line Company *can* adequately supply its requirements," it merely means as it may will or wish to supply.

VI.

The Contract, Even If Valid, Cannot Be Specifically Performed.

This and the preceding question, though suggested in our brief (p. 52), are not noticed by the Court at

all. Even if the contract is valid, the cause should be affirmed on this ground. This was the third question discussed by the Court of Appeals.

To require the specific performance of this contract in a suit brought by the respondent against the petitioners would require a court's supervision of the drilling of wells, the reports of geologists, examinations by geologists, and innumerable other things which a court of equity will not undertake. If the contract cannot be enforced by the respondent against the petitioners, the latter cannot enforce it against the former. This contract, under the Arkansas decisions, cannot be specifically performed.

Nakdimen v. *Atkinson Improvement Co.*, 149 Ark. 448.
Leonard v. *Board of Directors*, 79 Ark. 42.
Warmack v. *Major Stave Co.*, 132 Ark. 173.

In the last case, the Arkansas court expressly held that specific performance could not be compelled.

This Court, however, in the opinion suggests that public utilities may enter into reasonable arrangements with their customers when warranted by special circumstances, citing the case of *Warmack* v. *Major Stave Co., supra.* The only arrangement made in that case was one relating to the *manner of paying the utility by the Stave Company for the service.* The contract was not an exclusive contract. That "reasonable arrangement" was not a contract whereby the public utility bound its customer to take the service for all time to come.

The result is that the decision of the Court of Appeals of the Eighth Circuit was right on the whole

case. If this Court is of the opinion that the contract is valid, then said Court gave a wrong reason for a correct decision.

Thomas v. *K. C. S. Ry. Co.*, (8th Cir.) 277 Fed. 708.

That case came to this Court and the decision of the Circuit Court of Appeals was affirmed, although this Court in the opinion did not discuss the question of the case being correctly decided and a wrong reason assigned by the District Court, but did affirm the case.

Thomas v. *K. C. S. Ry. Co.*, 261 U. S. 481.

VII.

The Contract Is Too Indefinite in Time to Be Enforceable.

The contract, if valid, obligates the Harding Glass Company to take all its requirements from the Twin City Pipe Line Company "so long as the Twin City Pipe Line Company can adequately supply its requirements."

This Court in the opinion relies upon the case of *Fort Smith Light & Traction Co.* v. *Kelley*, 94 Ark. 461, as supporting the opinion of the District Court. A reexamination of that case is convincing that it not only does not support the opinion of the District Court, but is contrary thereto. This Court seems to be of the opinion that the said Kelley case holds that a contract in partial restraint of trade is valid. That case does use that language. However, before it used that language, the Court specifically said that *that contract did*

not in any manner restrain trade. An examination of the contract shows that it did not and could not restrain trade. That contract on its very face provided *for the widest competition.* The right to competition was expressly recognized in that contract. Every producing company had the right to sell gas in competition with Kelley under that contract. Therefore, the Court correctly held that that contract recognized competition and did not restrain trade. Therefore, anything which that Court said thereafter about that contract being in partial restraint of trade is wholly *obiter dictum.*

This Court also cites *Warmack* v. *Major Stave Co.,* 132 Ark. 173. The decision in that case expressly holds that specific performance will not be decreed against a public utility. The Court affirmed the case on the *duty* which the public utility owed to the customer. In the instant case, there is a duty upon the petitioners to furnish the gas under the law. Hence an agreement to furnish the gas on condition that the respondent take all its gas for all time to come is without consideration and void.

The Court in the opinion also cites the case of *Cap F. Bourland Ice Co.* v. *Franklin Utilities Co.,* 180 Ark. 770. We most respectfully urge that that case supports the contention of the respondent in this case. In that case the ice company endeavored to establish a monopoly through an order of the Railroad Commission prohibiting the establishment of another ice company at Fort Smith. There was no question of a contract between a public utility and a customer involved in that case. The only question was whether the act of the legislature was invalid as establishing a monop-

oly in violation of the Constitution of Arkansas. The Court held it invalid. Therefore, anything which the Court said thereafter indicating that there might be a monopoly is *obiter* and has no bearing upon this case.

For the reasons indicated, it is respectfully submitted that the petition for rehearing should be granted, and because of the great importance of the questions involved and their far-reaching effect, counsel respectfully ask, if consistent with the Court's rules, that said cause be restored to the docket and set for reargument, and that at the final hearing said cause be affirmed.

Respectfully submitted,

JOSEPH R. BROWN,
JAMES B. MCDONOUGH,
Counsel for Respondent.

Certificate of Counsel.

I, James B. McDonough, counsel for the above named respondent do hereby certify that the foregoing petition for rehearing of this cause is presented in good faith and not for delay. I further certify that after receiving the opinion of the Court in this cause, I carefully re-read the record and re-investigated the authorities, and, in my opinion, said petition is well taken.

JAMES B. MCDONOUGH,
Counsel for Respondent.

SUPREME COURT OF THE UNITED STATES.

No. 330.—October Term, 1930.

Twin City Pipe Line Company and Industrial Oil & Gas Company, Petitioners,
vs.
Harding Glass Company.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

[May 4, 1931.]

Mr. Justice Butler delivered the opinion of the Court.

The Twin City Pipe Line Company is a public utility. The Industrial Oil & Gas Company is a producer of natural gas in Arkansas. The majority of the stock of these companies is owned by the same shareholders. The respondent operates a large glass factory at Fort Smith. The pipe line company takes all the gas produced by the oil company, transports it by pipe line from the fields to Fort Smith and there furnishes it at prices fixed by public authority to industrial consumers and to another utility, the Fort Smith Light & Traction Company, which distributes it to domestic and commercial consumers.

Three suits, in which all the above named companies and one Hale were parties, were commenced in the latter part of 1925. Two were brought by the pipe line company to recover for gas furnished to the glass company. The other was a suit in equity in which the glass company was plaintiff and the other companies and Hale were defendants. At that time gas for the operation of the glass plant was being furnished from a main of the pipe line company laid in a street on which the site of the plant abuts. The plant was the largest consumer of gas in Fort Smith and required a dependable supply of from a million to a million and a half cubic feet per day. In its complaint the glass company alleged that the petitioners discriminated against it and failed to furnish an adequate supply; it asserted that the pipe line company was bound to construct a line about half a mile in length to connect a main,

used to deliver gas to the traction company, with the glass plant and to drill additional gas wells to provide an adequate supply. The traction company objected to the proposed connection on the ground that the pressure and supply of gas available for the service of its customers thereby would be impaired. The suits were consolidated and tried. July 26, 1926, the court entered its decree denying the glass company the relief sought in its suit, giving to the pipe line company judgment against the glass company for $17,155.46, to the latter judgment over against Hale and to him judgment over against the oil company for the same amount. The glass company and the oil company appealed.

By written instrument dated August 30, 1926, the parties settled all matters involved in the litigation. It was agreed that all judgments be satisfied and canceled, that all existing contracts between the parties be abrogated and that the appeals and suits be dismissed. The pipe line company agreed to build the additional line for the service of the glass company. The latter agreed to take all its requirements of gas so long as the pipe line company could adequately supply them and to pay the rates then in effect or thereafter fixed by public authority. The glass company agreed that in the event of a shortage of gas so that there was not enough adequately to supply domestic consumers the pipe line company might discontinue serving the glass company upon condition that the same character of service be given to it that was given to other industries.

All the agreements, save that of the glass company to continue to take its requirements of gas from the pipe line company, have been fully performed. The cost of the additional line constructed to serve the glass plant was $4,489.92. The oil company brought in seven wells while the suits were pending and twelve more after the contract was made. The gas from these was made available to the pipe line company for the service of its customers including the glass company. The latter took gas as agreed until January 2, 1929. About that time a company controlled by it completed a pipe line from gas fields to the glass plant. The glass company asserted that the contract was invalid because contrary to public policy and began to take practically all the gas it needed from its own subsidiary.

Petitioners brought this suit to enjoin the glass company from taking gas from anyone other than the pipe line company and to

require it specifically to perform the contract. The district court entered its decree granting the relief prayed. The Circuit Court of Appeals reversed and remanded the case with directions to dismiss the bill. 39 F. (2d) 408.

The question is whether the contract is unenforceable because contrary to public policy of Arkansas.

The general rule is that competent persons shall have the utmost liberty of contracting and that their agreements voluntarily and fairly made shall be held valid and enforced in the courts. *Printing Company* v. *Sampson*, L. R. 19 Eq. 462, 465. *Baltimore & Ohio Southwestern Ry.* v. *Voigt*, 176 U. S. 498, 505. The meaning of the phrase "public policy" is vague and variable; courts have not defined it and there is no fixed rule by which to determine what contracts are repugnant to it. The principle that contracts in contravention of public policy are not enforceable should be applied with caution and only in cases plainly within the reasons on which that doctrine rests. It is only because of the dominant public interest that one who, like respondent, has had the benefit of performance by the other party will be permitted to avoid his own promise. *Steele* v. *Drummond*, 275 U. S. 199, 205. *B. & W. Taxi Co.* v. *B. & Y. Taxi. Co.*, 276 U. S. 518, 528. *Holman* v. *Johnson*, Cowp. 341, 343.

In determining whether the contract here in question contravenes the public policy of Arkansas, the constitution, laws and judicial decisions of that State and as well the applicable principles of the common law are to be considered. Primarily it is for the lawmakers to determine the public policy of the State. *Kellogg* v. *Larkin*, 3 Pin. (Wis.) 123, 136. *Buck* v. *Walter*, 115 Minn. 239, 244. *McNamara* v. *Gargett*, 68 Mich. 454, 460-461. *People ex rel.* v. *Chicago Gas Trust Co.*, 130 Ill. 268, 294. The constitution of Arkansas (Art. II, § 19) declares: "Perpetuities and monopolies are contrary to the genius of a republic, and shall not be allowed . . ." This provision is a restraint upon the state legislature. *Cap. F. Bourland Ice Co.* v. *Franklin Utilities Co.*, 180 Ark. 770. No question of perpetuity is presented. And it is not shown that this contract was made as a part of a plan to create a monopoly or restrain trade or that it infringes any statute or regulation made under the authority of the State. Cf. §§ 7368, 7373, Crawford & Moses Digest.

We need not pause to determine whether the pipe line company was bound by franchise, statute or regulation to construct the additional pipe line demanded by the glass company for the service of its plant. The court decided against the glass company's claim. The settlement of that matter and the others in controversy constituted adequate consideration for the agreement to take and pay for the gas in question. *Mississippi River Logging Co.* v. *Robson*, 69 Fed. 773. It may not be held invalid in the absence of a clear showing that some definite public detriment will probably result from its performance. *Steele* v. *Drummond*, *supra*, 205. *B. & W. Taxi. Co.* v. *B. & Y. Taxi. Co.*, *supra*, 528. *Kellogg* v. *Larkin*, *supra*, 136.

The contract was not arbitrarily or unfairly imposed upon the glass company. It secured the exceptional means of service which the court held the pipe line company was not bound to furnish. The contract left the glass company free to obtain its supply elsewhere unless the pipe line company's service was adequate and bound the latter to rates—presumably just—fixed by public authority. Public utilities may enter into reasonable arrangements with their customers when warranted by special circumstances. *Warmack* v. *Major Stave Co.*, 132 Ark. 173, 178. *Hartford Ins. Co.* v. *Chicago &c. Railway*, 175 U. S. 91, 99. *Mann* v. *Pere Marquette R. Co.*, 135 Mich. 210, 218. It is not suggested that, when there is taken into account the gas made available by the wells brought in after the glass company's suit was commenced, the performance of the contract by the pipe line company leaves it without sufficient gas adequately to supply its other customers or interferes with the proper discharge of any of its duties as a public utility. The contract does not subject the glass company to, or tend in any manner to impose upon the public, any wrong, disadvantage or evil attributable to monopoly or restraint of trade.

The glass company has failed to show that the contract has any tendency to injure the public, and no reason appears why it should not be enforced according to its terms. The decision of the district court is in principle strongly supported by the supreme court of Arkansas in *Ft. Smith Light & Traction Company* v. *Kelley*, 94 Ark. 461. And see *Kimbro* v. *Wells*, 112 Ark. 126, 130. *Warmack* v. *Major Stave Co.*, *supra*. *Griffin* v. *Oklahoma Natural Gas Corp.*, 37 F. (2d) 545.

Decree reversed.